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CALLAGHAN & COMPANY
401 East Ohio Street
Chicago 11, Illinois

Federal Administrative Law

*A Treatise on the Legal Principles Governing
the Validity of Action of Federal Admin-
istrative Agencies, and of State
Agencies on Federal
Questions*

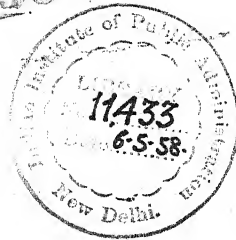
By
F. Trowbridge vom Baur

IN TWO VOLUMES

VOLUME 1

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PREFACE

Several years ago, before the recent federal administrative agencies had acquired importance in the public mind, the author became engaged in various types of judicial review litigation. At first the problems involved appeared not only to be complex, but also to be not susceptible of clear answer. Yet in the necessary course of reading a great number of cases in constantly-branching fields of substantive law, it gradually became apparent that there were clear answers, and that the principles governing the validity of administrative action which were laid down in a particular case applied equally to agencies other than the one there involved. Moreover, a wealth of expository material appeared in leading cases which were often tucked away in isolated or forgotten fields of substantive law. This material, being constitutional interpretation, was singularly consistent despite the diversity in its substantive fields of application.

However, it was so difficult to find all the cases dealing with particular subject matter, while the results of a continual search proved so remarkably revealing, that the author kept wondering why someone had not written a book organized, as taught in the cases, according to administrative subject matter—that is, “horizontally” instead of by agency or substantive field. From time to time, the same query cropped up elsewhere in statements made by others interested in administrative law. Finally, in January, 1939, despite the requirements of a busy practice, this work was undertaken simply because the urge to demonstrate the integration of the subject in the cases could no longer be withstood.

Perception that the structure of administrative law is “horizontal” rather than “vertical” came to the author perhaps sooner than to lawyers who have not found it necessary to read as many cases. The appearances of course indicate the contrary. For instance, Interstate Commerce Commission cases have been digested under “Carriers,” “Commerce,” and “Railroads.” State agency cases were put under “Public Service Commissions,” and even under “Gas,” “Waters and Watercourses,” “Electricity,” and “Street Railroads.” Immigration cases were segregated under “Aliens” and Board of Tax Appeals cases were collected under “Internal Revenue.” Cases involving

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various agencies each of which consisted of an individual cabinet officer were divided, among others, between "Agriculture," "War," "Post Office," "Public Lands," and "Mandamus." Labor Board cases were herded into "Master and Servant," Bituminous Coal Commission cases interred with "Mines and Minerals," and SEC cases scattered through "Licenses" and other topics. This diffused approach in the digests symbolized a more general conception among lawyers that administrative law consisted of a variety of isolated "vertical" channels in separate fields of substantive law, heterogeneous in character. It was even commonly asserted that there was no such thing as administrative law.

However, the rules governing the validity of administrative action in each field of substantive law have emerged as substantially similar, resting on the same constitutional foundations. A decision as to the validity of the action of one agency is ordinarily in point respecting the action of other agencies, barring unusual statutory provisions. And under the Supreme Court's leadership the opinions have tended more and more, in applying to a particular agency a rule generally applicable, to cite cases involving a great variety of agencies. But still the "horizontal" structure of the subject is not widely understood. It is freely admitted that there is a serious general lack of understanding of the subject, and it is difficult to see how this can be cleared up until the "horizontal" structure of administrative law is displayed to the profession in some concrete form.

Accordingly, the material in the following pages is organized on horizontal lines, that is, a general rule stated is annotated by cases supporting the rule which involve a variety of agencies, classified according to agency where more than three cases are cited. A grouping of the cases along these common principles which cut horizontally through the various fields of substantive law and apply comprehensively to all administrative action which affects private rights, should provide a central source of cases as well as a text statement which is generally applicable. Moreover, it should also serve to emphasize the pervasive importance of the great landmark cases which hitherto may have been regarded as isolated in special fields of substantive law. It is the author's hope that the material in the following pages, so organized, will contribute something toward a genuine understanding of administrative law as an integrated field with generally applicable principles and a definite personality.

It is also the author's hope that the material will serve to emphasize the importance of precision in the use of words. The administrative process is set in motion by the delegation of power exercisable by the

PREFACE

legislature, and is terminated by the correlated requirement of administrative findings. Hence it begins, ends, and uniquely hangs its very existence upon the appropriate use of words. Obviously, these words must be used with enlightenment. If words of standard meaning are to be insincerely applied to cloak a personal or economic whim, a political philosophy or other ulterior motive, and judicially accepted as such, any system of constitutional government will be reduced in a twinkling to a rule of individual caprice. Our courts have continued to scrutinize the words used by both legislature and agency to be certain that their use is honest and accurate, necessarily throwing into bold relief the present-day significance of the eternal battle of the rule of law versus discretion. More than ever the conclusion is inescapable that words must be carefully chosen by the legislature, and used honestly and with precision by administrative agencies, if government in a complex society is to be administered in a fair and orderly manner.

The contrast between questions of fact and questions of law ("administrative" and "judicial" questions), around which this work is constructed, has been criticized in rather general terms by some of the writers. But to the author's view the criticism has never reflected the fundamental importance of constitutional theory or the practical necessity of working terms. Which governmental sphere has jurisdiction over a question is necessarily the first consideration. If the separation of powers is to be maintained, fact questions within the legislative sphere, and questions of law requiring the exercise of judicial power, must be severely differentiated. The separation of the two categories by appropriate phrase affords a necessary expression of the profound differences between legislative and judicial power. It provides the only method of channelizing the otherwise characterless field of administrative law. And it has served remarkably well as a practical tool in the crucible of litigation.

In the preparation of this treatise with its horizontal structure, an independent search was made of 310 volumes of the United States reports, 112 volumes of the Federal Reporter, Second Series, and 33 volumes of the Federal Supplement. The language of the text is, so far as possible, the language of the opinions; and full quotations are sprinkled among the major topics in an effort to render the treatment fully persuasive. On the other hand; no attempt has been made to solidify the footnotes with masses of citations. Authorities are cited with the twofold design of attracting the reader quickly to the line of important cases on a particular point, and providing a panorama of the variety of agencies in the administrative landscape to which a

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particular principle has been applied. Leading cases are frequently starred (*), as it is usually easiest to grasp a rule from a leading case which summarizes previous authorities or provides a reliable discussion of principles.

Two appendixes follow the text. The first is a collection of the statutes relating to judicial review of the various agencies, and the second a collection of forms for use in judicial review litigation.

Grateful acknowledgments are due to the Harvard Law Review and Chief Justice Stone for permission to reprint from the latter's article, "The Common Law in the United States"; to the University of Pennsylvania Law Review for permission to quote from Mr. Justice Frankfurter's article, "The Task of Administrative Law"; to G. P. Putnam Sons for permission to use excerpts from Professor Goodnow's books, "Comparative Administrative Law" and "Principles of the Administrative Law of the United States"; and to the American Judicature Society for permission to quote from Judge Lobingier's article "The Place of Administrative Law in Legal Classification."

The author wishes to express his gratitude to Albert B. Dearden and John Howland for their valuable assistance in reading the cases; to Albert Borner for his comprehensive aid in the checking of proofs, and to him and the efficient Editorial Staff of Callaghan and Company for their general assistance with the mechanical difficulties of book-writing; to Miss Rita V. Kelly, Mrs. Adele V. Sweeny and Miss Ruth A. Wood for their cheerful and competent stenographic assistance; and to my long-suffering wife, for her patience—all of which made this book possible.

F. TROWBRIDGE VOM BAUR

15 Broad Street,
New York, N. Y.
October 28, 1941

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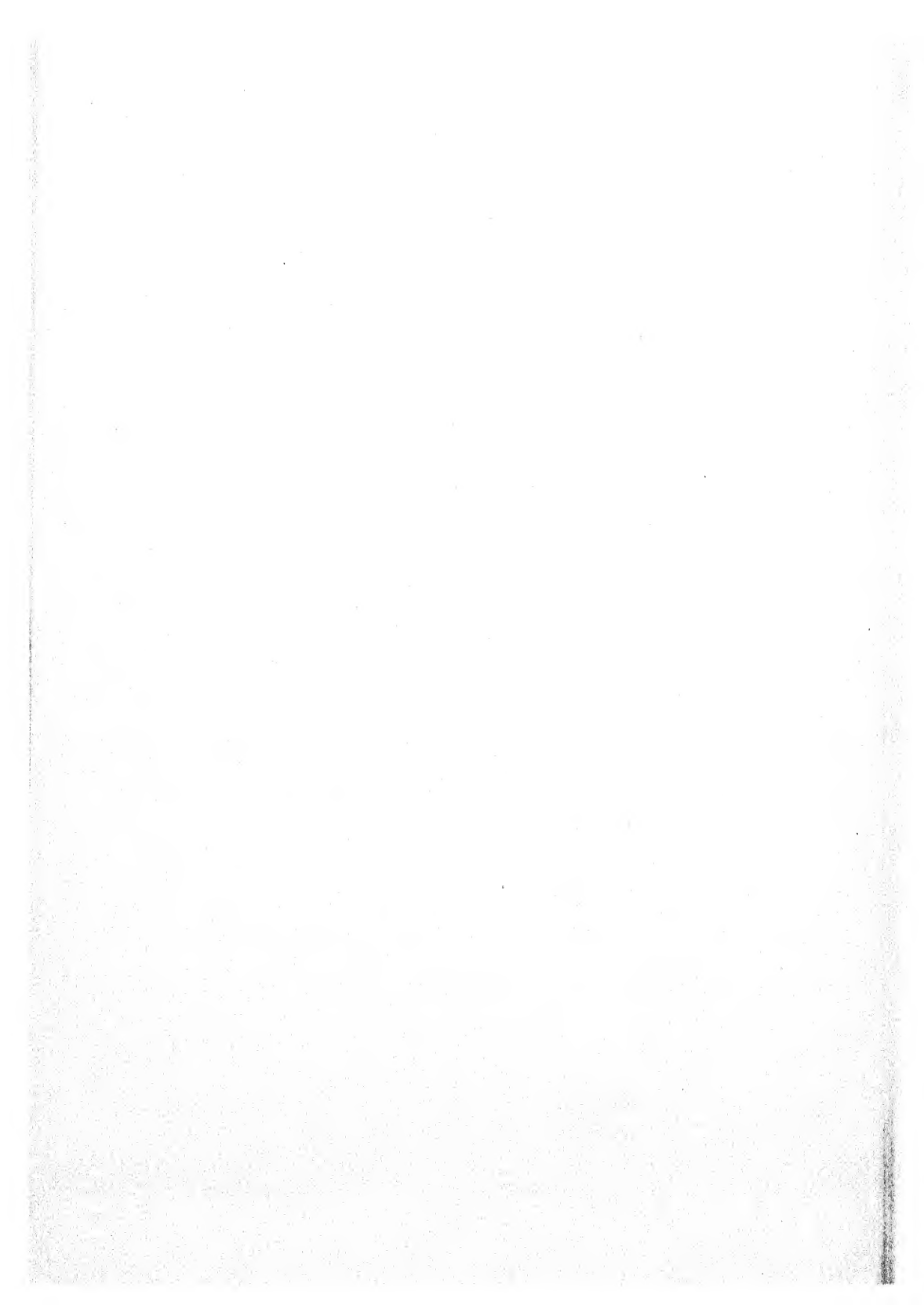
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THE CONSTITUTION OF THE UNITED STATES

ARTICLE III, §§ 1-2

“Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

“Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between citizens of different States,—between citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.”



Federal Administrative Law

Volume 1

BOOK I

FOUNDATION AND NATURE, DEVELOPMENT AND SCOPE OF ADMINISTRATIVE LAW

CHAPTER 1

THE NATURE OF ADMINISTRATIVE LAW: CONTROLLING CONSTITUTIONAL PRINCIPLES

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- § 3. The Supremacy of Law and Separation of Powers as the Backbone of Administrative Law.
- § 4. —Fundamental Criterion of Administrative Law: The Type of Question Involved.
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I. THE NATURE AND SCOPE OF ADMINISTRATIVE LAW

§ 1. Definitions.

There have been a variety of definitions of administrative law. In the broadest sense, it is a field huge in scope, with vague contours, and in that sense Mr. Justice Frankfurter's definition is accurate and comprehensive.¹

Under any broad definition the field appears to be divided into three branches, (1) the body of statutes endowing agencies with powers and laying down rules of substantive law relating thereto to be enforced by means of those powers; (2) the body of agency-made law, consisting of administrative rules, regulations, reports or opinions containing findings of fact, and orders; and (3) the legal principles, resting on the Constitution as their base, governing the acts of public agents which conflict with private rights, and defining their validity.

The first branch, while providing the foundation for the activity of administrative agencies, partakes more of the character of ordinary substantive law than anything else, since its primary purpose is to lay down legislative standards, policies, or rules of conduct, stipulating the conditions of their application. The second division is in truth a body of law made by administrative agencies, but purports to be no more than an application of the substantive principles provided by statute. The real heart of the field appears to lie in the third category—the rules governing the validity of the acts and conduct of the administrative agents of the government. This is the one homogeneous branch of the subject. The others are scattered, in oddly shaped packages, throughout a variety of fields of substantive law and peculiar factual situations, with few common attributes.

¹ "Administrative law deals with the field of legal control exercised by law-administering agencies other than courts, and the field of control exercised by courts over such agencies." Felix Frankfurter in "The Task of Administrative Law," (1927) 75 Univ. of Pa. L. Rev. 614, 615.

Administrative law has also been said to be "that branch of public law which deals with administration ('government in action')." Lobinger in "The Place of Administrative Law in Legal Classification," (1940) p. 24, Journal of the American Judicature Society, pp. 87, 92, in which miscellaneous definitions are collected.

This is indicated by Professor Goodnow's definition,² and it would appear that if the field is to be recognized as one with a definite personality, and if the prime significance, both theoretical and practical, of the subject is to be appreciated, the intangible and diffuse aspects of "administrative law" must be narrowed to an adequate definition of the third branch above-described dealing with asserted private rights. Thus it may be said, at least in a practical sense, that administrative law is the set of legal principles governing the acts of public agents which conflict with asserted private rights and which are not performed directly by the legislative or judicial bodies of the government. Administrative law is therefore not substantive law, yet it cuts horizontally across all fields of substantive law in which powers are exercised by public agents outside the legislature and judiciary.

The importance, to a definition and understanding of the field, of the assertion of private rights claimed to be injured by acts of such public agents is fundamental. Public agents may act among themselves and adjust their problems internally without affecting private rights and so becoming parties to litigation which give rise to the establishment of principles of case-made law. But where it is claimed that private rights are affected, litigation ensues and the courts determine the validity of administrative action in accordance with stated rules. In other words, the great bulk of the principles of law governing acts of public agents are established in litigated cases, and these arise, with rare exceptions, only where asserted private interests are affected. It is obvious that the heart of the field, and the reason for its existence, lies in the assertion of private rights.

Statutes setting up administrative schemes establish substantive law except to the extent that they provide rules for ascertaining the validity of the acts of such public agents. To that extent administrative law is statutory. Otherwise, it is case law created because of the assertion of private rights.

This work deals only with principles of federal administrative law, although most of these principles involve federal questions applicable to both federal and state agencies.

§ 2. Administrative Law Distinguished from Other Branches of Constitutional Law.

Direct legislative action is subject to judicial review on constitutional grounds, and may be invalidated by courts if found to con-

² "Administrative law is therefore that part of the law which fixes the organization and determines the competence of the authorities which execute the law, and indicates to the individual remedies for the violation

travene constitutional provisions. And a constitutional attack upon an administrative order may be made without calling into question the act of the administrative agency in applying the legislative mandate contained in the order. Such an attack is directed to the face of the statute applied by administrative act,³ and involves no question of administrative law. Where, however, the question is not whether the mandate of the statute exceeds the constitutional powers of Congress, but whether the act of an administrative agent in invoking the mandate of the statute in a particular case, is valid, the question is one of administrative law. Thus administrative law is concerned for the most part with the validity of administrative action under a statute; while other branches of constitutional law deal with the validity of the statutes themselves independently of administrative action taken under them.

Questions of delegation of legislative power are, strictly speaking, not questions of administrative law since they are directed to the validity of the face of a statute, and thus are questions in other fields of constitutional law. However, the principles of constitutional law applicable to delegation of legislative power form the foundation upon which many of the principles of administrative law are constructed.⁴

§ 3. The Supremacy of Law and Separation of Powers as the Backbone of Administrative Law.

The unique attributes of our system arise out of the Constitution. Its foundation is the English doctrine of the supremacy of law, and thus shuts out the possible arbitrary views and practices of the Continent.⁵ It sets that supremacy down in writing, and so makes it

of his rights." Frank J. Goodnow in "Principles of the Administrative Law of the United States," (1905) p. 17.

³ See *Arizona Grocery Co. v. Atchison, T. & S. F. R. Co.* (1932) 284 U. S. 370, 76 L. Ed. 348, 52 S. Ct. 183.

⁴ "While constitutional law defines the general plan of state organization and action, administrative law carries out this plan in its minutest details, supplements, and complements it." Frank J. Goodnow in "Comparative Administrative Law," (1893) p. 15.

⁵ "Distinguishing characteristics are its development of law by a system of judicial precedent, its use of

the jury to decide issues of fact, and its all-pervading doctrine of the supremacy of law—that the agencies of government are no more free than the private individual to act according to their own arbitrary will or whim, but must conform to legal rules developed and applied by courts. Any attempt to appraise the progress of the common law in the United States or to predict its future must be concerned with at least some of these features of the system." Harlan F. Stone in "The Common Law in the United States" (1936) 50 Harv. L. Rev. 4, 5.

"Arbitrary power and the rule of the Constitution cannot both exist.

articulate and guaranties its permanence in a way that the country of its origin does not.⁶ And it explicitly vests the different branches of the government with their respective powers, thus giving rise to the doctrine of separation of powers.

The Constitution expressly vests the executive, legislative, and judicial powers in the three branches of the government. This is interpreted to mean that each branch must exercise the powers vested in it, and cannot give them away nor have them taken away.⁷ This

They are antagonistic and incompatible forces; and one or the other must of necessity perish whenever they are brought into conflict. To borrow the words of Mr. Justice Day—‘there is no place in our constitutional system for the exercise of arbitrary power.’ *Garfield v. Goldsby*, 211 U. S. 249, 262. To escape assumptions of such power on the part of the three primary departments of the government, is not enough. Our institutions must be kept free from the appropriation of unauthorized power by lesser agencies as well. And if the various administrative bureaus and commissions, necessarily called and being called into existence by the increasing complexities of our modern business and political affairs, are permitted gradually to extend their powers by encroachments—even petty encroachments—upon the fundamental rights, privileges and immunities of the people, we shall in the end, while avoiding the fatal consequences of a supreme autocracy, become submerged by a multitude of minor invasions of personal rights, less destructive but no less violative of constitutional guaranties.” (Mr. Justice Sutherland in *Jones v. Securities & Exchange Commission* (1936) 298 U. S. 1, 24, 25, 80 L. Ed. 1015, 56 S. Ct. 654.)

6 “The common-law doctrine of the supremacy of law did not, it is true, preclude government action. It only required that such action should be in conformity to standards which expe-

rience had shown were essential to orderly administration and to the protection of the rights of the citizen. The Constitution set up those standards in the requirements of procedural due process.” Harlan F. Stone in “*The Common Law in the United States*” (1936) 50 *Harv. L. Rev.* 4, 21.

7 “It may be stated then, as a general rule inherent in the American constitutional system, that, unless otherwise expressly provided or incidental to the powers conferred, the legislature cannot exercise either executive or judicial power; the executive cannot exercise either legislative or judicial power; the judiciary cannot exercise either executive or legislative power. The existence in the various constitutions of occasional provisions expressly giving to one of the departments powers which by their nature otherwise would fall within the general scope of the authority of another department emphasizes, rather than casts doubt upon, the generally inviolate character of this basic rule.” (Mr. Justice Sutherland in *Springer v. Philippine Islands* (1928) 277 U. S. 189, 201, 202, 72 L. Ed. 845, 48 S. Ct. 480.)

“It is believed to be one of the chief merits of the American system of written constitutional law, that all the powers intrusted to government, whether State or national, are divided into the three grand departments, the executive, the legislative, and the judicial. That the functions

interpretation reflects the intention of the members of the Constitutional Convention, many of whom were impregnated with Montesquieu's doctrines, of which this, based upon a misunderstanding of the British Constitution, was one.⁸ When the doctrine that the in-

appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also essential to the successful working of this system that the persons intrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other." (Mr. Justice Miller in *Kilbourn v. Thompson* (1880) 103 U. S. 168, 190, 191, 26 L. Ed. 377.)

"The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question. So much is implied in the very fact of the separation of the powers of these departments by the Constitution; and in the rule which recognizes their essential co-equality. The sound application of a principle that makes one master in his own house precludes him from imposing his control in the house of another who is master there. James Wilson, one of the framers of the Constitution and a former justice of this court, said that the independence of each department required that its proceedings 'should be free from the remotest influence, direct or indirect, of either of the other two powers.' Andrews, *The Works of James Wilson* (1896) Vol. 1,

p. 367. And Mr. Justice Story in the first volume of his work on the Constitution, 4th Ed., § 530, citing No. 48 of the *Federalist*, said that neither of the departments in reference to each other 'ought to possess, directly or indirectly, an overruling influence in the administration of their respective powers.' And see *O'Donoghue v. United States*, *supra*, at pp. 530-531.

"The power of removal here claimed for the President falls within this principle, since its coercive influence threatens the independence of a commission, which is not only wholly disconnected from the executive department, but which, as already fully appears, was created by Congress as a means of carrying into operation legislative and judicial powers, and as an agency of the legislative and judicial departments." (Mr. Justice Sutherland in *Humphrey v. United States* (1935) 295 U. S. 602, 629, 630, 79 L. Ed. 1611, 55 S. Ct. 869.)

The United States Constitution imposes no such requirement upon the states, however, *Pacific Telephone & Telegraph Co. v. Seattle* (1934) 291 U. S. 300, 78 L. Ed. 810, 54 S. Ct. 383; *Crowell v. Benson* (1932) 285 U. S. 22, 76 L. Ed. 598, 52 S. Ct. 285. And see *Puget Sound Power & Light Co. v. Seattle* (1934) 291 U. S. 619, 78 L. Ed. 1025, 54 S. Ct. 542; *Commissioners of Road Improvement Dist. No. 2 v. St. Louis Southwestern R. Co.* (1922) 257 U. S. 547, 66 L. Ed. 364, 42 S. Ct. 250; *Louisville & N. R. Co. v. Garrett* (1913) 231 U. S. 298, 58 L. Ed. 229, 34 S. Ct. 48.

⁸ See *Humphrey v. United States* (1935) 295 U. S. 602, 79 L. Ed. 1611, 55 S. Ct. 869; *O'Donoghue v. United*

strumentality vested with a power by the Constitution must exercise it is applied to the distribution of powers between the three branches of government, it is known as the doctrine of separation of powers. It has always been regarded as necessary to our constitutional system.⁹

There are two basic constitutional principles responsible for the development of federal administrative law, (1) the separation of powers with emphasis upon the common law foundation of the supremacy of law, and Article III of the Constitution,¹⁰ and (2) the requirements of due process of law provided in the Fifth and Fourteenth Amendments.¹¹ The backbone of administrative law is the doctrine of separation of powers. Under this doctrine both legislative and judicial spheres must be preserved inviolate even though an administrative agent may exercise certain legislative powers and may appear to exercise judicial powers.

In preserving the legislative sphere under the doctrine of separation of powers, a definitive body of law has arisen governing the extent to which powers of legislative character may be delegated to an administrative agent.¹² The exercise of delegated legislative power to complete the legislative process may not be interfered with by the executive. For instance, the power of removal possessed by the Presi-

States (1933) 289 U. S. 516, 77 L. Ed. 1356, 53 S. Ct. 740.

⁹ *Humphrey v. United States* (1935) 295 U. S. 602, 79 L. Ed. 1611, 55 S. Ct. 869; *O'Donoghue v. United States* (1933) 289 U. S. 516, 77 L. Ed. 1356, 53 S. Ct. 740.

"In the main, however, that instrument, the model on which are constructed the fundamental laws of the States, has blocked out with singular precision, and in bold lines, in its three primary articles, the allotment of power to the executive, the legislative, and the judicial departments of the government. It also remains true, as a general rule, that the powers confided by the Constitution to one of these departments cannot be exercised by another.

"It may be said that these are truisms which need no repetition here to give them force. But while the experience of almost a century has

in general shown a wise and commendable forbearance in each of these branches from encroachments upon the others, it is not to be denied that such attempts have been made, and it is believed not always without success. The increase in the number of States, in their population and wealth, and in the amount of power, if not in its nature to be exercised by the Federal government, presents powerful and growing temptations to those to whom that exercise is intrusted, to overstep the just boundaries of their own department, and enter upon the domain of one of the others, or to assume powers not intrusted to either of them." (Mr. Justice Miller in *Kilbourn v. Thompson* (1880) 103 U. S. 168, 191, 192, 26 L. Ed. 377).

¹⁰ See § 41.

¹¹ See § 38.

¹² See § 8.

dent over executive officers is inapplicable to an agency to which legislative power has been delegated.¹³ And where legislative powers have been lawfully delegated, their exercise by an agent may not be interfered with by the courts except where a situation appropriate for the constitutional exercise of the judicial power is presented.¹⁴ Thus administrative remedies, being legislative in character, must be exhausted before judicial relief may be sought. This is basically the primary jurisdiction doctrine.¹⁵ And on judicial review the doctrine of administrative finality applies to determinations of legislative matters, or to use the phrase uniformly used throughout this work, administrative questions.¹⁶

Conversely, the legislative branch may not encroach upon the judicial sphere. Under the principles of constitutional law permitting the delegation of certain legislative powers, administrative agencies undertake to apply a legislative policy or standard to particular facts. This has given rise to a practical situation, of profound importance respecting the development of administrative law, in which agencies venture a decision upon a question of law in order to dispose of a particular case.¹⁷ But a decision by an agency on a question of law is never binding *per se*, and such questions are always open for independent judicial decision in an appropriate case.¹⁸

When the judicial power has been exhausted remand to the agency is the appropriate method for return of the cause to the legislative sphere for determination of any remaining administrative questions.¹⁹

Questions of *res judicata* and companion legal principles are necessarily solved by the requirement of preserving the independence of the two spheres.²⁰

The constitutional safeguards relating to delegation of legislative power, due process, and judicial review of legislative action are set up as bulwarks, along different approaches, for the fundamental of all constitutional doctrines—the supremacy of law.²¹

§ 4. — Fundamental Criterion of Administrative Law: The Type of Question Involved.

Since the doctrine of separation of powers provides the backbone of administrative law, the fundamental criterion responsible for differ-

¹³ See § 141.

¹⁴ See § 41.

¹⁵ See § 226 et seq.

¹⁶ See § 505 et seq.

¹⁷ See § 73.

¹⁸ See § 425.

¹⁹ See § 788 et seq.

²⁰ See § 255 et seq.

²¹ See John Dickinson in "Administrative Justice and the Supremacy of Law," (1927) p. 75.

ing principles of administrative law is the type of power or question involved in a particular administrative determination.²² If the question involved is one of fact, not necessarily within the judicial power under Article III of the Constitution, and has been delegated for administrative determination, it is an administrative question, legislative in character, removed from judicial control on the evidence by the primary jurisdiction doctrine²³ and the doctrine of administrative finality.²⁴ If, however, it is a question of law affecting a party's legal rights, it is a judicial question open for independent decision by an appropriate court acting judicially, regardless of the fact that an administrative agency may have found it necessary to venture an initial decision thereon in order, as a practical matter, to make a determination.²⁵ And if the question involved be one of constitutional power or right it ordinarily depends upon facts, and in that event a case or controversy under Article III is presented for judicial decision on the facts. This necessarily means that, in order to exercise the judicial function, the court must exercise its independent judgment on both the facts and the law. Hence there is a trial *de novo*, and the doctrine of administrative finality cannot apply to the facts insofar as the constitutional question is concerned.²⁶

The profound differences between these three types of questions are mountainous in their constitutional implications and their responsibility for the various principles of administrative law. In effect, these three types of questions have split the bulk of the principles of administrative law into three boldly separated channels. They are of controlling importance in every case, and in any analysis of a controversy with an administrative agency they must necessarily be of first importance.²⁷

§ 5. Determination of Facts Not Exclusively Within the Judicial Power: The Due Process Clause.

The Constitution requires that Congress neither withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at common law, or in equity, or in admiralty, nor bring under the judicial power a matter which, from its nature, is not a

²² See *Great Northern R. Co. v. Merchants Elevator Co.* (1922) 259 U. S. 285, 66 L. Ed. 943, 42 S. Ct. 477.

²³ See § 213 et seq.

²⁴ See § 509.

²⁵ See § 425.

²⁶ See § 261 et seq.

²⁷ See John Dickinson in "Administrative Justice and the Supremacy of Law," (1927) Preface p. viii.

subject for judicial determination.²⁸ Facts which are the subject of such suits must be tried in a judicial proceeding, though not necessarily by judges.²⁹ Yet both in cases arising between the government and those subject to it, and in cases of private right, determinations of fact must be made which, from their nature, do not require judicial determination and yet are susceptible of it. The mode of determination being within its control Congress may reserve to itself the power to determine, or may delegate that power to legislative or executive officers or other administrative agencies, to legislative courts, or to judicial tribunals.³⁰ And even where it is essential to maintain strictly

²⁸ Den ex dem. *Murray v. Hoboken Land & Improvement Co.* (1856) 18 How. (59 U. S.) 272, 15 L. Ed. 372.

²⁹ "The present case does not fall within the categories just described but is one of private right, that is, of the liability of one individual to another under the law as defined. But in cases of that sort, there is no requirement that, in order to maintain the essential attributes of the judicial power, all determinations of fact in constitutional courts shall be made by judges. On the common law side of the Federal courts, the aid of juries is not only deemed appropriate but is required by the Constitution itself. In cases of equity and admiralty, it is historic practice to call to the assistance of the courts, without the consent of the parties, masters and commissioners or assessors, to pass upon certain classes of questions, as, for example, to take and state an account or to find the amount of damages. While the reports of masters and commissioners in such cases are essentially of an advisory nature, it has not been the practice to disturb their findings when they are properly based upon evidence, in the absence of errors of law, and the parties have no right to demand that the court shall redetermine the facts thus found." (Mr. Chief Justice Hughes in *Crowell v. Benson* (1932) 285 U. S.

22, 51, 52, 76 L. Ed. 598, 52 S. Ct. 285.)

30 Court of Claims.

See *United States v. Gilliat* (1896) 164 U. S. 42, 41 L. Ed. 344, 17 S. Ct. 16.

For an instance of an administrative agency that became a legislative court (the Court of Claims), see *Williams v. United States* (1933) 289 U. S. 553, 565, 77 L. Ed. 1372, 53 S. Ct. 751.

The Court of Customs and Patent Appeals.

* *Ex parte Bakelite Corp.* (1929) 279 U. S. 438, 73 L. Ed. 789, 49 S. Ct. 411. **Secretary of Labor.**

Lloyd Sabaudo Societa Anonima v. Elting (1932) 287 U. S. 329, 77 L. Ed. 341, 53 S. Ct. 167.

Secretary of War.

See *Monongahela Bridge Co. v. United States* (1910) 216 U. S. 177, 54 L. Ed. 435, 30 S. Ct. 356.

Solicitor of the Treasury.

* Den ex dem. *Murray v. Hoboken Land & Improvement Co.* (1856) 18 How. (59 U. S.) 272, 15 L. Ed. 372.

State Agencies.

Louisville & N. R. Co. v. Garrett (1913) 231 U. S. 298, 58 L. Ed. 229, 34 S. Ct. 48.

Workmen's Compensation Cases.

* *Crowell v. Benson* (1932) 285 U. S. 22, 76 L. Ed. 598, 52 S. Ct. 285.

the distinction between the judicial and other branches of the government, it must still be recognized that the ascertainment of facts, or the reaching of conclusions upon evidence taken in the course of a hearing of parties interested, may be entirely proper in the exercise of execu-

Quotations.

"As to determinations of fact, the distinction is at once apparent between cases of private right and those which arise between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments. The Court referred to this distinction in *Murray v. Hoboken Land & Improvement Co.*, supra, pointing out that 'there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.' Thus the Congress, in exercising the powers confided to it, may establish 'legislative' courts (as distinguished from 'constitutional courts in which the judicial power conferred by the Constitution can be deposited') which are to form part of the government of territories or of the District of Columbia, or to serve as special tribunals 'to examine and determine various matters, arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it.' But 'the mode of determining matters of this class is completely within congressional control. Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals.' Ex parte *Bakelite Corp.*, 279 U. S. 438, 451. Familiar illustrations of administra-

tive agencies created for the determination of such matters are found in connection with the exercise of the congressional power as to interstate and foreign commerce, taxation, immigration, the public lands, public health, the facilities of the post office, pensions and payments to veterans.'" (Mr. Chief Justice Hughes in *Crowell v. Benson* (1932) 285 U. S. 22, 50, 51, 76 L. Ed. 598, 52 S. Ct. 285.)

"Still, the hearing and determination, viewed as prerequisite to the fixing of rates, are merely preliminary to the legislative act. To this act, the entire proceeding led; and it was this consequence which gave to the proceeding its distinctive character. Very properly, and it might be said, necessarily—even without the express command of the statute—would the Commission ascertain whether the former, or existing, rate, was unreasonable before it fixed a different rate. And in such an inquiry, for the purpose of prescribing a rule for future, there would be no invasion of the province of the judicial department. Even where it is essential to maintain strictly the distinction between the judicial and other branches of the government, it must be recognized that the ascertainment of facts, or the reaching of conclusions upon evidence taken in the course of a hearing of parties interested, may be entirely proper in the exercise of executive or legislative, as distinguished from judicial, powers. The legislature, had it seen fit, might have conducted similar inquiries through committees of its members, or specially constituted

tive or legislative, as distinguished from judicial, powers. The legislature itself, or its delegates, may use methods like those of judicial tribunals in the endeavor to elicit the facts preliminary to a legislative act. In such an inquiry, for the purpose of determining a rule for the future, there is no invasion of the province of the judicial department.³¹ The delegation of the rate-making power to a commission does not deprive the carrier of property without due process of law, or deny it the equal protection of the laws. In the absence of a legislative rate it is the province of the courts in deciding cases that arise between shippers and carriers to pass upon the reasonableness of rates. In so doing, the courts apply the common law. But it is the province of the legislature to change the law; and when the legislature, or the body acting under its authority, establishes the rate to be thereafter charged by the carrier, it is the duty of the courts to enforce the rule of law

bodies, upon whose report as to the reasonableness of existing rates it would decide whether or not they were extortionate and whether other rates should be established, and it might have used methods like those of judicial tribunals in the endeavor to elicit the facts. It is 'the nature of the final act' that determines 'the nature of the previous inquiry.' *Prentiss v. Atlantic Coast Line*, 211 U. S. 210, 227." (Mr. Justice Hughes in *Louisville & N. R. Co. v. Garrett* (1913) 231 U. S. 298, 307, 58 L. Ed. 229, 34 S. Ct. 48.)

"To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination. At the same time there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which con-

gress may or may not bring within the cognizance of the courts of the United States, as it may deem proper." (Mr. Justice Curtis in *Den ex dem. Murray v. Hoboken Land & Improvement Co.* (1856) 18 How. (59 U. S.) 272, 284, 15 L. Ed. 372.)

"As was pointed out in the *Stranahan* case, the statute imposing the fines must be regarded as an incident to the exercise by Congress of its plenary power to control the admission of aliens, and due process of law does not require that the courts, rather than administrative officers, be charged, in any case, with determining the facts upon which the imposition of such a fine depends. It follows that as the fines are not invalid, however imposed, because unreasonable or confiscatory in amount, which is conceded, Congress may choose the administrative rather than the judicial method of imposing them." (Mr. Justice Stone in *Lloyd Sabaudo Societa Anonima v. Elting* (1932) 287 U. S. 329, 335; 77 L. Ed. 341, 53 S. Ct. 167.)

³¹ *Louisville & N. R. Co. v. Garrett* (1913) 231 U. S. 298, 58 L. Ed. 229, 34 S. Ct. 48.

so made, unless the constitutional limits of the rate-making power have been transgressed.³² Similarly, the determination of certain questions of liability for injury may be taken from the courts and given to an administrative agency.³³

Thus administrative agencies often conduct proceedings of an adversary nature involving one or more private litigants. Although conducted by a legislative agency it is obvious that a proceeding of an adversary nature is like a trial in a court and is of a quasi-judicial character.³⁴ Accordingly they have been held to be subject to the requirements of procedural due process, and so must accord with the basic principles of fair play embodied in the judicial tradition.³⁵

§ 6. Practical Basis for Development of Administrative Agencies and Administrative Law.

With this background of distribution of constitutional powers, administrative law developed for reasons of an essentially practical nature. Broadening concepts of the responsibility of government brought novel legislative standards and rules of conduct. A new complexity in the economic structure required, as a practical matter, that certain agencies, as administrative arms of the legislature, determine whether such standards and rules of conduct applied to particular facts, from time to time. It was obviously futile to attempt to apply these legislative standards and rules of conduct through laws of general application, particularly respecting such matters of diverse application and paramount economic importance as the reasonableness of rates, and unfair trade and labor practices.³⁶ To a large degree administrative agencies have been a response to the felt need of governmental supervision over economic enterprise, a supervision which could effectively be exercised neither directly through self-executing legislation, nor by the judicial process. This movement was natural and its extension inevitable. Perhaps its most striking characteristic is the investiture of administrative agencies with power far exceeding and different from the judicial power.³⁷ Their members are called

³² *Louisville & N. R. Co. v. Garrett* (1913) 231 U. S. 298, 58 L. Ed. 229, 34 S. Ct. 48.

³³ *Crowell v. Benson* (1932) 285 U. S. 22, 76 L. Ed. 598, 52 S. Ct. 285.

³⁴ See § 276.

³⁵ See § 274 et seq.

³⁶ An excellent statement of the reasons for resort to the administra-

tive process is to be found in the Final Report of the Attorney General's Committee (1941) pp. 11-17.

³⁷ *Federal Communications Commission v. Pottsville Broadcasting Co.* (1940) 309 U. S. 134, 84 L. Ed. 656, 60 S. Ct. 437.

"Looking back over the fifty years which have passed since the establish-

upon to exercise the trained judgment of a body of experts "appointed by law and informed by experience."³⁸

The obvious purpose of legislation establishing an administrative scheme is to furnish a prompt, continuous, expert and inexpensive method for dealing with a class of questions of fact which are peculiarly suited to examination and determination by an administrative agency especially assigned to that task. The object is to secure immediate investigation and a sound practical judgment. The efficacy of the plan depends upon the finality of the determinations of fact within the purview of the act.³⁹ The administrative process has been said to have as some of its most valuable qualities, swiftness in meeting new or emergency situations, ease of adjustment to change, and flexibility in the light of experience.⁴⁰

§ 7. Role of Administrative Procedure in the Development of Administrative Law.

This necessitated a procedural departure from the classical method of general application by statute of a specific legislative standard. For example, railroad rates in the past were specifically fixed by statute. As this proved impractical with industrial development, unreasonable rates in general were prohibited, and administrative agencies were empowered to find whether a particular rate was unreasonable, and if so to apply the statutory mandate prohibiting it. Moreover, this creation of administrative proceedings of an adversary character involved questions of law, so that an agency could seldom act without venturing a decision on one or more questions of law, that is, judicial questions.⁴¹ Many of these judicial questions are elementary or have been so settled by the courts that their answer is obvious. But judicial questions they are, within the judicial sphere, and susceptible of a binding decision only by an appropriate court acting

ment of the Interstate Commerce Commission, no one can now seriously doubt the possibility of establishing an administrative system which can be made to satisfy and harmonize the requirements of due process and the common-law ideal of supremacy of law, on the one hand, and the demand, on the other, that government be afforded a needed means to function, freed from the necessity of strict conformity to the traditional procedure of the courts." Harlan F.

Stone in "The Common Law in the United States" (1936) 50 Harv. L. Rev. 4, 16, 17.

³⁸ *Humphrey v. United States* (1935) 295 U. S. 602, 79 L. Ed. 1611, 55 S. Ct. 869.

³⁹ *Crowell v. Benson* (1932) 285 U. S. 22, 76 L. Ed. 598, 52 S. Ct. 285.

⁴⁰ *Helvering v. Wilshire Oil Co.* (1939) 308 U. S. 90, 84 L. Ed. 101, 60 S. Ct. 18.

⁴¹ See § 424 et seq.

judicially. Hence this procedural factor led to judicial review and the case principles of administrative law.

The role of administrative procedure in the development of administrative law also brought confusion. Direct action of the legislature was relatively simple; and methods of judicial review thereof and the ascertainment of legal rights in connection therewith was also relatively simple. But administrative procedure in cases of any consequence was at first a confusing novelty, and made the ascertainment of one's legal rights exceptionally difficult. Administrative agencies have a role essentially executive, but may exercise powers of legislative character and they appear to exercise judicial powers.⁴² The nature of administrative procedure may thus be said to be the controlling factor giving rise to principles of administrative law by the application of constitutional criteria to an apparent concentration of all governmental powers, legislative, executive, and judicial, in one hand, in order to preserve the substance of the doctrine of separation of powers.

II. DELEGATION OF LEGISLATIVE POWER

A. *In General*

§ 8. Delegation by Congress.

Administrative law, involving as it does acts of public agents, based on statutory authority, depends upon delegation by a legislature to an agency of certain power to act. The agency's exercise of this power, whether it be mere authority to perform a ministerial duty or power of a legislative character, gives rise to litigated cases and the establishment of principles of law applicable to the acts of those clothed with such power.

Authority to perform ministerial acts may be delegated to administrative agents without constitutional difficulty, as such functions are not of legislative or judicial character. But powers of legislative character may only be delegated where the subject of regulation is clearly defined⁴³ and a standard, policy, or rule of conduct for application of the regulation is clearly set forth by the legislature.⁴⁴ Gratuity cases form an exception to this rule.^{44a} The rules as to the delegation of federal legislative power derive from the wording of the Constitution, and are thus peculiar to the United States. They

⁴² See § 73.

⁴³ See § 21.

⁴⁴ See § 22.

^{44a} See § 425 et seq.

are the result of a consistent development from the earliest years of the Union.

§ 9. Delegation by States.

The doctrine of separation of powers, and the rules as to delegation deriving from it are not imposed upon the states by the Federal Constitution, although state constitutions may, of course, set up the requirement. The Fourteenth Amendment does not require that legal duties be defined by any particular agency of the state government.⁴⁵ A state may distribute its powers as it sees fit, provided only that it acts consistently with the essential demands of due process and does not transgress those restrictions of the Federal Constitution which are applicable to state authority.⁴⁶ The legislative power of a state may be exerted by a constitution, an act of the legislature, or an act of any subordinate instrumentality of the state exercising delegated legislative authority, like an ordinance of a municipality or an order of a commission.⁴⁷ The legislature may act directly, or, in the absence of constitutional restriction, it may commit authority to a subordinate body. The order of such a body is a legislative act, under the body's delegated power. It has the same force as if made by the legislature. Thus it is a "law" passed by the state, within the meaning of the contract clause.⁴⁸ If permitted by their own constitutions states may unite judicial and legislative power in a single hand.⁴⁹ Hence all questions of delegation of legislative powers to

⁴⁵ *Pacific Telephone & Telegraph Co. v. Seattle* (1934) 291 U. S. 300, 78 L. Ed. 810, 54 S. Ct. 383; *Crowell v. Benson* (1932) 285 U. S. 22, 76 L. Ed. 598, 52 S. Ct. 285; *Erie R. Co. v. Public Utility Com'rs* (1921) 254 U. S. 394, 65 L. Ed. 322, 41 S. Ct. 169; *Prentiss v. Atlantic Coast Line Co.* (1908) 211 U. S. 210, 53 L. Ed. 150, 29 S. Ct. 67. See also *Puget Sound Power & Light Co. v. Seattle* (1934) 291 U. S. 619, 78 L. Ed. 1025, 54 S. Ct. 542, rehearing denied 292 U. S. 603, 78 L. Ed. 1466, 54 S. Ct. 712.

⁴⁶ *Crowell v. Benson* (1932) 285 U. S. 22, 76 L. Ed. 598, 52 S. Ct. 285.

⁴⁷ *Standard Computing Scale Co. v. Farrell* (1919) 249 U. S. 571, 63 L. Ed. 780, 39 S. Ct. 380; *Myles Salt Co. v. Board of Com'rs of Iberia & St.*

Mary Drainage Dist. (1916) 239 U. S. 478, 60 L. Ed. 392, 36 S. Ct. 204. See also *Grand Trunk R. Co. v. Michigan Railroad Commission* (1913) 231 U. S. 457, 58 L. Ed. 310, 34 S. Ct. 152.

⁴⁸ *Louisville & N. R. Co. v. Garrett* (1913) 231 U. S. 298, 58 L. Ed. 229, 34 S. Ct. 48.

⁴⁹ *Keller v. Potomac Electric Power Co.* (1923) 261 U. S. 428, 67 L. Ed. 731, 43 S. Ct. 445; *Commissioners of Road Improvement Dist. No. 2 v. St. Louis Southwestern R. Co.* (1922) 257 U. S. 547, 66 L. Ed. 364, 42 S. Ct. 250; *Louisville & N. R. Co. v. Garrett* (1913) 231 U. S. 298, 58 L. Ed. 229, 34 S. Ct. 48. See also *Pacific Live Stock Co. v. Lewis* (1916) 241 U. S. 440, 60 L. Ed. 1084, 36 S. Ct. 637.

state administrative agencies are questions of state law exclusively,⁵⁰ and whether a state constitution permits the delegation of a power to a state agency is wholly a state question.⁵¹ A state may of course give quasi-judicial duties to an administrative agency.⁵²

§ 10. — Federal Questions.

All questions of fact and policy, the determination of which rests in the legislative branch of the state government, may be made by a subordinate administrative body if the Constitution of the state permits. The supreme and other federal courts may only inquire whether a determination is arbitrary or capricious,⁵³ or whether a statute is invalid under the Fourteenth Amendment as purporting to confer arbitrary discretion,⁵⁴ such as the arbitrary discretion to withhold a dentist's license, or to impose conditions which have no application to the applicant's qualifications to practice.⁵⁵ Where a state statute with regard to licensing dentists clearly indicates the general standard of fitness and the character and scope of the examination, whether the applicant possesses the qualifications inherent in the standard is a question of fact. The determination of that fact ordinarily involves the determination of two subsidiary questions of fact: what knowledge and skill fits one to practice, and whether the applicant possesses such knowledge and skill. The latter finding is necessarily an individual one. The former is ordinarily one of general application. Hence it can be embodied in rules. The legislature itself may make this finding of the facts of general application, and by embodying it in the statute make it law. But the legislature need not do so. To determine the subjects of which the applicant should have knowledge, the extent of such knowledge, the degree of skill requisite, and the procedure to be followed in conducting the examination, are matters appropriately committed to an administrative board. And the legislature may, consistently with the Federal Constitution, delegate to such board the function of determining these things, as well as the functions of determining whether the

⁵⁰ *Pacific States Box & Basket Co. v. White* (1935) 296 U. S. 176, 80 L. Ed. 138, 56 S. Ct. 159, 101 A. L. R. 853.

⁵¹ *Douglas v. Noble* (1923) 261 U. S. 165, 67 L. Ed. 590, 43 S. Ct. 303.

⁵² *Pacific Live Stock Co. v. Lewis* (1916) 241 U. S. 440, 60 L. Ed. 1084, 36 S. Ct. 637.

⁵³ *Pacific States Box & Basket Co. v. White* (1935) 296 U. S. 176, 80 L. Ed. 138, 56 S. Ct. 159, 101 A. L. R. 853; *Douglas v. Noble* (1923) 261 U. S. 165, 67 L. Ed. 590, 43 S. Ct. 303.

⁵⁴ *Yick Wo v. Hopkins* (1886) 118 U. S. 356, 30 L. Ed. 220, 6 S. Ct. 1064.

⁵⁵ *Douglas v. Noble* (1923) 261 U. S. 165, 67 L. Ed. 590, 43 S. Ct. 303.

applicant complies with the detailed standard of fitness.⁵⁶ Thus in the construction of the statute delegating the power, the Supreme Court follows applicable decisions of the highest court of the state.⁵⁷ Where that court has upheld the statute, and the statute has been in force for a length of time such as thirty years without further attack in that court, the Supreme Court, even in the absence of a controlling state decision, will decline to give the statute a construction which would render it void, unless compelled to do so by unequivocal language in the act.⁵⁸

B. Powers Which May Be Delegated

§ 11. Congress Cannot Delegate Its Essential Legislative Functions.

The Constitution provides that "All legislative powers herein granted shall be vested in a Congress of the United States . . ." ⁵⁹ which is given the power "to make all laws which shall be necessary and proper for carrying into execution" its general powers.⁶⁰ Congress manifestly is not permitted to abdicate, or to transfer to others, the essential legislative functions with which it is thus vested. If it could our constitutional system could not be maintained.⁶¹ For instance, Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade and industry.⁶² Congress cannot delegate its legislative authority to trade or industrial associations or groups so as to enable them to enact the laws they deem wise and beneficent for the rehabilitation and expansion of their trade and industries.⁶³ Such a delegation of legislative power is unknown to our law and utterly inconsistent with the constitutional prerogatives and duties of Congress.⁶⁴ Instances in

⁵⁶ Douglas v. Noble (1923) 261 U. S. 165, 67 L. Ed. 590, 43 S. Ct. 303.

⁵⁷ Douglas v. Noble (1923) 261 U. S. 165, 67 L. Ed. 590, 43 S. Ct. 303.

⁵⁸ Douglas v. Noble (1923) 261 U. S. 165, 67 L. Ed. 590, 43 S. Ct. 303.

⁵⁹ Art. I, § 1.

⁶⁰ Art. I, § 8, par. 18.

⁶¹ A. L. A. Schechter Poultry Corp. v. United States (1935) 295 U. S. 495, 79 L. Ed. 1570, 55 S. Ct. 837, 97 A. L. R. 947; Panama Refining Co. v. Ryan (1935) 293 U. S. 388, 79 L. Ed. 446, 55 S. Ct. 241.

⁶² A. L. A. Schechter Poultry Corp. v. United States (1935) 295 U. S. 495, 79 L. Ed. 1570, 55 S. Ct. 837, 97 A. L. R. 947; Panama Refining Co. v. Ryan (1935) 293 U. S. 388, 79 L. Ed. 446, 55 S. Ct. 241.

⁶³ A. L. A. Schechter Poultry Corp. v. United States (1935) 295 U. S. 495, 79 L. Ed. 1570, 55 S. Ct. 837, 97 A. L. R. 947.

⁶⁴ A. L. A. Schechter Poultry Corp. v. United States (1935) 295 U. S. 495, 79 L. Ed. 1570, 55 S. Ct. 837, 97 A. L. R. 947.

which Congress has availed itself of the assistance of those most vitally concerned and most familiar with the problems in question, e. g., in the recognition of local customs or rules of miners as to mining claims, or in technical matters, such as designating the standard height of drawbars, provide no precedent for such delegation.⁶⁵

§ 12. — Essential Legislative Functions: Other Phrases.

The phrases "purely legislative power,"⁶⁶ or "the legislative power of Congress"⁶⁷ or simply "legislative power"⁶⁸ have been used as synonymous with "essential legislative functions."

§ 13. Scope of Legislative Powers Which May Be Delegated, in General.

The doctrine of separation of powers is not a mere technical concept, but a rule of substance based on experience and interpreted with common sense.⁶⁹ The forbidden delegation of the power to make

⁶⁵ A. L. A. Schechter Poultry Corp. v. United States (1935) 295 U. S. 495, 79 L. Ed. 1570, 55 S. Ct. 837, 97 A. L. R. 947.

⁶⁶ J. W. Hampton Jr. & Co. v. United States (1928) 276 U. S. 394, 72 L. Ed. 624, 48 S. Ct. 348.

⁶⁷ United States v. Shreveport Grain & Elevator Co. (1932) 287 U. S. 77, 77 L. Ed. 175, 53 S. Ct. 42.

⁶⁸ Panama Refining Co. v. Ryan (1935) 293 U. S. 388, 79 L. Ed. 446, 55 S. Ct. 241; Marshall Field & Co. v. Clark (1892) 143 U. S. 649, 36 L. Ed. 294, 12 S. Ct. 495.

⁶⁹ "The well-known maxim '*Delegata potestas non potest delegari*,' applicable to the law of agency in the general and common law, is well understood and has had wider application in the construction of our Federal and State Constitutions than it has in private law. The Federal Constitution and State Constitutions of this country divide the governmental power into three branches. The first is the legislative, the second is the executive, and the third is the judicial, and the rule is that in the actual

administration of the government Congress or the Legislature should exercise the legislative power, the President or the State executive, the Governor, the executive power, and the Courts or the judiciary the judicial power, and in carrying out that constitutional division into three branches it is a breach of the National fundamental law if Congress gives up its legislative power and transfers it to the President, or to the Judicial branch, or if by law it attempts to invest itself or its members with either executive power or judicial power. This is not to say that the three branches are not co-ordinate parts of one government and that each in the field of its duties may not invoke the action of the two other branches in so far as the action invoked shall not be an assumption of the constitutional field of action of another branch. In determining what it may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental co-ordi-

the law, which necessarily involves discretion as to what the law shall be, is to be distinguished from the conferring of authority or discretion as to its execution, to be exercised under and in pursuance of the law.⁷⁰ Legislation must often be adapted to complex conditions involving innumerable details with which Congress cannot deal directly.⁷¹ The Constitution does not deny Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply.⁷² Otherwise

nation." (Mr. Chief Justice Taft in *J. W. Hampton Jr. & Co. v. United States* (1928) 276 U. S. 394, 405, 406, 72 L. Ed. 624, 48 S. Ct. 348.)

See Frankfurter and Landis in 'Power of Congress Over Procedure in Criminal Contempts in 'Inferior' Federal Courts'—A study in separation of powers (1924) 37 Harv. L. Rev. 1010.

⁷⁰ *Panama Refining Co. v. Ryan* (1935) 293 U. S. 388, 79 L. Ed. 446, 55 S. Ct. 241; *Marshall Field & Co. v. Clark* (1892) 143 U. S. 649, 692, 693, 36 L. Ed. 294, 12 S. Ct. 495.

⁷¹ *A. L. A. Schechter Poultry Corp. v. United States* (1935) 295 U. S. 495, 79 L. Ed. 1570, 55 S. Ct. 837, 97 A. L. R. 947; *Panama Refining Co. v. Ryan* (1935) 293 U. S. 388, 79 L. Ed. 446, 55 S. Ct. 241; *United States v. Grimaud* (1911) 220 U. S. 506, 55 L. Ed. 563, 31 S. Ct. 480.

⁷² See § 22.

Federal Communications Commission.

Federal Communications Commission v. Pottsville Broadcasting Co. (1940) 309 U. S. 134, 84 L. Ed. 656, 60 S. Ct. 437.

Interstate Commerce Commission.

Delaware & Hudson Co. v. United States (D. C. S. D. N. Y. 1925) 5 F. (2d) 831.

The President.

* *A. L. A. Schechter Poultry Corp.*

v. United States (1935) 295 U. S. 495, 79 L. Ed. 1570, 55 S. Ct. 837, 97 A. L. R. 947; * *Panama Refining Co. v. Ryan* (1935) 293 U. S. 388, 79 L. Ed. 446, 55 S. Ct. 241; *Marshall Field & Co. v. Clark* (1892) 143 U. S. 649, 36 L. Ed. 294, 12 S. Ct. 495.

Secretary of Agriculture.

United States v. Rock Royal Cooperative, Inc. (1939) 307 U. S. 533, 83 L. Ed. 1446, 59 S. Ct. 993; *Curran v. Wallace* (1939) 306 U. S. 1, 83 L. Ed. 441, 59 S. Ct. 379; *United States v. Grimaud* (1911) 220 U. S. 506, 55 L. Ed. 563, 31 S. Ct. 480; *United States v. Griffin* (D. C. S. D. Ga., Savannah Div., 1935) 12 F. Supp. 135; *Shouse v. Moore* (D. C. E. D. Ky. 1935) 11 F. Supp. 784.

Secretary of War.

Union Bridge Co. v. United States (1907) 204 U. S. 364, 51 L. Ed. 523, 27 S. Ct. 367.

Quotations.

"*Third.* The argument that there is an unconstitutional delegation of legislative power is equally untenable. This is not a case where Congress has attempted to abdicate, or to transfer to others, the essential legislative functions with which it is vested by the Constitution. Art. I, § 1; § 8, Par. 18. See *Panama Refining Co. v. Ryan*, 293 U. S. 388, 421; *Schechter Corp. v. United States*, 295 U. S. 495,

there would be the anomaly of a legislative power which in many instances calling for its exertion would be a mere futility.⁷³ The re-

529, 541, 542, 553. We have always recognized that legislation must often be adapted to conditions involving details with which it is impracticable for the legislature to deal directly. We have said that—"The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply. Without capacity to give authorizations of that sort we would have the anomaly of a legislative power which in many circumstances calling for its exertion should be but a futility." *Panama Refining Co. v. Ryan*, supra. In such cases 'a general provision may be made, and power given to those who are to act under such general provisions to fill up the details.' *Wayman v. Southard*, 10 Wheat. 1, 43. We think that the Tobacco Inspection Act belongs to that class." (Mr. Chief Justice Hughes in *Curran v. Wallace* (1939) 306 U. S. 1, 15, 83 L. Ed. 441, 59 S. Ct. 379.)

"The Constitution provides that 'All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.' Art. I, § 1. And the Congress is empowered 'To make all laws which shall be necessary and proper for carrying into execution' its general powers. Art. I, § 8, par. 18. The Congress manifestly is not permitted to abdicate, or to transfer to others, the essential legislative functions with

which it is thus vested. Undoubtedly legislation must often be adapted to complex conditions involving a host of details with which the national legislature cannot deal directly. The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply. Without capacity to give authorizations of that sort we should have the anomaly of a legislative power which in many circumstances calling for its exertion would be but a futility. But the constant recognition of the necessity and validity of such provisions, and the wide range of administrative authority which has been developed by means of them, cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained." (Mr. Chief Justice Hughes in *Panama Refining Co. v. Ryan* (1935) 293 U. S. 388, 421, 79 L. Ed. 446, 55 S. Ct. 241.)

"Beyond question, if it had so elected, Congress, in some effective mode and without previous investigation through Executive officers, could have determined for itself, primarily, the fact whether the bridge here in question was an unreasonable obstruction to navigation, and, if it was found to be of that character, could by direct legislation have required the defendant to make such alterations of its bridge as were requisite for the protection of navigation and commerce over the water-

quirement most commonly referred to is that Congress must lay down an intelligible policy, standard, or rule of conduct as expression of its essential legislative function.⁷⁴ Congress may not only give authorizations to determine specific facts, but may establish primary standards, devolving upon others the duty of carrying out the declared legislative policy, that is, "to fill up the details" under the general provisions made by the legislature.⁷⁵ The delegation is valid when the authority conferred has direct relation to the standards prescribed and can be exercised only upon findings based upon evidence with respect to particular conditions.⁷⁶ If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized, e. g., to fix reasonable railroad rates, is directed to con-

way in question. But investigations by Congress as to each particular bridge alleged to constitute an unreasonable obstruction to free navigation and direct legislation covering each case, separately, would be impracticable in view of the vast and varied interests which require National legislation from time to time. By the statute in question Congress declared in effect that navigation should be freed from unreasonable obstructions arising from bridges of insufficient height, width of span or other defects. It stopped, however, with this declaration of a general rule and imposed upon the Secretary of War the duty of ascertaining what particular cases came within the rule prescribed by Congress, as well as the duty of enforcing the rule in such cases." (Mr. Justice Harlan in *Union Bridge Co. v. United States* (1907) 204 U. S. 364, 386, 51 L. Ed. 523, 27 S. Ct. 367.)

"Legislative power was exercised when Congress declared that the suspension should take effect upon a named contingency. What the President was required to do was simply in execution of the act of Congress. It was not the making of law. He was the mere agent of the law-making de-

partment to ascertain and declare the event upon which its expressed will was to take effect. It was a part of the law itself as it left the hands of Congress that the provisions, full and complete in themselves, permitting the free introduction of sugars, molasses, coffee, tea and hides, from particular countries, should be suspended, in a given contingency, and that in case of such suspensions certain duties should be imposed." (Mr. Justice Harlan in *Marshall Field & Co. v. Clark* (1892) 143 U. S. 649, 693, 36 L. Ed. 294, 12 S. Ct. 495.)

⁷³ *Panama Refining Co. v. Ryan* (1935) 293 U. S. 388, 79 L. Ed. 446, 55 S. Ct. 241.

⁷⁴ See § 22.

⁷⁵ *Marshall, C. J.*, in *Wayman v. Southard*, 10 Wheat. (23 U. S.) 1, 43, 6 L. Ed. 253, cited in *Panama Refining Co. v. Ryan* (1935) 293 U. S. 388, 79 L. Ed. 446, 55 S. Ct. 241; *Humphrey v. United States* (1935) 295 U. S. 602, 79 L. Ed. 1611, 55 S. Ct. 869; *United States v. Grimaud* (1911) 220 U. S. 506, 55 L. Ed. 563, 31 S. Ct. 480.

⁷⁶ *A. L. A. Schechter Poultry Corp. v. United States* (1935) 295 U. S. 495, 79 L. Ed. 1570, 55 S. Ct. 837, 97 A. L. R. 947. See also § 550 et seq.

form, such legislative action is not a forbidden delegation of legislative power.⁷⁷ Within these tests Congress need specify only so far as is reasonably practical,⁷⁸ but the exercise of validly delegated power must be restricted by statute within these definite limits.⁷⁹

§ 14. — Power to Investigate.

Agencies may be given the power of investigation, separate from the power to take action. For instance, the Interstate Commerce Commission is required by the Valuation Act⁸⁰ to make valuations of railroad property which, while they may be the basis of later action, are not reviewable orders in themselves.⁸¹ They are solely an exercise of the function of investigation.⁸² A valuation investigation is undertaken in aid of the legislative purpose of regulation. In conducting the investigation, and in making its report, the Commission performs a service specifically delegated and prescribed by Congress.⁸³ The Commission's report has the same attributes as that of a Committee of Congress.⁸⁴

§ 15. — Power to Make Regulations.

Delegation of power to make regulations has been said to confer administrative functions.⁸⁵ From the beginning of the government Congress has conferred upon executive officers the power to make regulations—not for the government of their departments, but for administering laws which govern, to “fill up the details.”⁸⁶

⁷⁷ *Panama Refining Co. v. Ryan* (1935) 293 U. S. 388, 79 L. Ed. 446, 55 S. Ct. 241; *J. W. Hampton Jr. & Co. v. United States* (1928) 276 U. S. 394, 72 L. Ed. 624, 48 S. Ct. 348.

⁷⁸ *United States v. Rock Royal Cooperative, Inc.* (1939) 307 U. S. 533, 83 L. Ed. 1446, 59 S. Ct. 993.

⁷⁹ *J. W. Hampton Jr. & Co. v. United States* (1928) 276 U. S. 394, 72 L. Ed. 624, 48 S. Ct. 348. See also *Mahler v. Eby* (1924) 264 U. S. 32, 68 L. Ed. 549, 44 S. Ct. 283.

⁸⁰ 49 USCA 19a.

⁸¹ See §§ 187, 195.

⁸² *United States v. Los Angeles & S. L. R. Co.* (1927) 273 U. S. 299, 71 L. Ed. 651, 47 S. Ct. 413.

⁸³ *United States v. Los Angeles &*

S. L. R. Co. (1927) 273 U. S. 299, 71 L. Ed. 651, 47 S. Ct. 413.

⁸⁴ *United States v. Los Angeles & S. L. R. Co.* (1927) 273 U. S. 299, 71 L. Ed. 651, 47 S. Ct. 413.

⁸⁵ *United States v. Shreveport Grain & Elevator Co.* (1932) 287 U. S. 77, 77 L. Ed. 175, 53 S. Ct. 42; *United States v. Grimaud* (1911) 220 U. S. 506, 55 L. Ed. 563, 31 S. Ct. 480.

⁸⁶ *United States v. Grimaud* (1911) 220 U. S. 506, 55 L. Ed. 563, 31 S. Ct. 480.

“It must be admitted that it is difficult to define the line which separates legislative power to make laws, from administrative authority to make regulations. This difficulty has often been recognized, and was

Congress may use executive officers to secure the exact effect intended by its acts of legislation by vesting discretion in them to make regulations interpreting a statute and directing the details of its execution.⁸⁷ Such regulations become, indeed, binding rules of conduct, but they are valid only as subordinate rules and when found to be within the framework of the policy which the legislature has sufficiently defined.⁸⁸ The limits of the power to issue regulations are well settled. They may not extend a statute or modify its provisions.⁸⁹

Treasury regulations furnish the most common example of exercise of delegated power to make regulations,⁹⁰ while regulations of the

referred to by Chief Justice Marshall in *Wayman v. Southard*, 10 Wheat. 1, 42, where he was considering the authority of courts to make rules. He there said: 'It will not be contended that Congress can delegate to the courts, or to any other tribunals, powers which are strictly and exclusively legislative. But Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself.' What were these non-legislative powers which Congress *could* exercise but which might also be delegated to others was not determined, for he said: 'The line has not been exactly drawn which separates those important subjects, which *must* be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details.'

"From the beginning of the Government various acts have been passed conferring upon executive officers power to make rules and regulations—not for the government of their departments, but for administering the laws which did govern. None of these statutes could confer legislative power. But when Congress had legislated and indicated its will, it could give to those who were to act

under such general provisions 'power to fill up the details' by the establishment of administrative rules and regulations, the violation of which could be punished by fine or imprisonment fixed by Congress, or by penalties fixed by Congress or measured by the injury done.'" (Mr. Justice Lamar in *United States v. Grimaud* (1911) 220 U. S. 506, 517, 55 L. Ed. 563, 31 S. Ct. 480.)

⁸⁷ *Board of Tax Appeals.*

Buttfield v. Stranahan (1904) 192 U. S. 470, 48 L. Ed. 525, 24 S. Ct. 349. *Secretary of Agriculture.*

United States v. Shreveport Grain & Elevator Co. (1932) 287 U. S. 77, 77 L. Ed. 175, 53 S. Ct. 42; **United States v. Grimaud* (1911) 220 U. S. 506, 55 L. Ed. 563, 31 S. Ct. 480.

Tariff Commission.

**J. W. Hampton Jr. & Co. v. United States* (1928) 276 U. S. 394, 72 L. Ed. 624, 48 S. Ct. 348.

⁸⁸ *Panama Refining Co. v. Ryan* (1935) 293 U. S. 388, 79 L. Ed. 446, 55 S. Ct. 241.

⁸⁹ *Campbell v. Galeno Chemical Co.* (1930) 281 U. S. 599, 74 L. Ed. 1063, 50 S. Ct. 412. See also §§ 64, 489 et seq.

⁹⁰ *Helvering v. Rankin* (1935) 295 U. S. 123, 79 L. Ed. 1343, 55 S. Ct. 732; *Fawcett Machine Co. v. United States* (1931) 282 U. S. 375, 75 L. Ed. 397, 51 S. Ct. 144.

Secretary of Agriculture furnish another common example,⁹¹ and state agencies likewise have exercised the power.⁹²

§ 16. — Prescription of Uniform System of Accounts.

An administrative agency may be delegated power to require in its discretion a "uniform" system of accounting, and to prohibit other methods of accounting than those which the agency may prescribe. In other words, Congress may lay down general rules for the guidance of the agency, leaving to it merely the carrying out of details in the exercise of the power so conferred.⁹³ Such delegation is valid although the grant does not stop short of the point where the regulation in essence goes not to the form but to the substance; even if some interference with the internal affairs of the regulated corporation indirectly results.⁹⁴

§ 17. — Power to Determine Facts.

Congress may validly delegate the determination of facts, not necessarily the subject of judicial cognizance, to which a declared policy, standard, or rule of conduct applies, to a legislative court or an administrative agency as well as to a judicial tribunal.⁹⁵ Even where it is essential to maintain strictly the distinction between the judicial and other branches of the government, it must still be recognized that the ascertainment of facts, or the reaching of conclusions upon evidence taken in the course of a hearing of parties interested, may be entirely proper in the exercise of executive or legislative, as distinguished from judicial, powers.⁹⁶ The classic example of this kind of delegation is seen in the power of the Interstate Commerce Commission to determine whether particular rates are unreasonably high, and if found to be unreasonably high to apply the mandate or declared policy of the Interstate Commerce Act prohibiting the col-

⁹¹ *United States v. Griffin* (D. C. S. D. Ga., Savannah Div., 1935) 12 F. Supp. 135; *Shouse v. Moore* (D. C. E. D. Ky. 1935) 11 F. Supp. 784 (Secy. of Agriculture).

⁹² See *P. F. Petersen Baking Co. v. Bryan* (1934) 290 U. S. 570, 78 L. Ed. 505, 54 S. Ct. 277, 90 A. L. R. 1285.

⁹³ *Kansas City Southern Ry. Co. v. United States* (1913) 231 U. S. 423, 58 L. Ed. 296, 34 S. Ct. 125;

* *American Telephone & Telegraph Co. v. United States* (D. C. S. D. N. Y. 1936) 14 F. Supp. 121, aff'd 299 U. S. 232, 81 L. Ed. 142, 57 S. Ct. 170.

⁹⁴ *Kansas City Southern Ry. Co. v. United States* (1913) 231 U. S. 423, 58 L. Ed. 296, 34 S. Ct. 125.

⁹⁵ See §§ 5, 8.

⁹⁶ *Louisville & N. R. Co. v. Garrett* (1913) 231 U. S. 298, 58 L. Ed. 229, 34 S. Ct. 48. See also § 5.

lection of such rates⁹⁷ by ordering the carrier to cease and desist therefrom. The validity of delegation of power to make findings under factual standards is fully settled, even though such standards are not chemists' or engineers' definitions.⁹⁸ Common factual standards in administrative schemes include "bituminous coal," "just and reasonable" rates, "unreasonable obstruction" to navigation, and the like.⁹⁹ Broader standards like "public interest," "public convenience and necessity," and "protection of investors" are standards of equivalent factual import, and are limited by the concrete legislative policies and rules of conduct specifically laid down in the particular act. They do not have vague reference to the public welfare.^{99a}

Power to find facts may be subdelegated to a subordinate unit or division of an agency, subject to final determination by the agency.¹

§ 18. — Power to Issue Licenses.

Many state administrative agencies are given power to issue and revoke licenses.² This power is also legislative in character. It seldom appears, however, in the federal branch of the government, due perhaps to the nature of the subject matter of federal regulation.³ Under the Prohibition Act, the Commissioner of Internal Revenue was given the power, in the exercise of his discretion, to issue permits to operate plants for denaturing alcohol.⁴

§ 19. — Foreign Affairs.

The statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs. A delegation of legislative power invalid as to domestic affairs may be valid as to foreign affairs.⁵

⁹⁷ 49 USCA 1 (5).

⁹⁸ *Sunshine Anthracite Coal Co. v. Adkins* (1940) 310 U. S. 381, 84 L. Ed. 1263, 60 S. Ct. 907.

⁹⁹ *Sunshine Anthracite Coal Co. v. Adkins* (1940) 310 U. S. 381, 84 L. Ed. 1263, 60 S. Ct. 907.

^{99a} See § 568.

¹ *Beehler v. United States* (C. C. A. 6th, 1930) 40 F. (2d) 313.

² See *Douglas v. Noble* (1923) 261 U. S. 165, 69 L. Ed. 590, 43 S. Ct. 303.

³ See §§ 98 (Comm. of Int. Rev.), 102 (FAA), 103 (FCC), 127 (SEC).

⁴ *Ma-King Products Co. v. Blair* (1926) 271 U. S. 479, 70 L. Ed. 1046, 46 S. Ct. 544.

⁵ *United States v. Curtiss-Wright Export Corp.* (1936) 299 U. S. 304, 81 L. Ed. 255, 57 S. Ct. 216.

C. Delegates of Legislative Power

§ 20. In General.

The usual delegate of power by Congress is a governmental body or officer including the President of the United States.⁶ A governmental official is presumptively disinterested, and accordingly is a proper delegate of the power.⁷ But the fact that a government officer is theoretically disinterested and impartial is no excuse for stretching the limits of legislative power which may be delegated. To this rule the President himself is no exception. The point is not one of motive, but of constitutional authority, for which the best of motives is not a substitute.⁸

A private party subject to the statutory regulation, or one of its employees, is not a proper delegate. Conferring of legislative power

⁶ See *The Brig Aurora v. United States* (1813) 7 Cranch (11 U. S.) 382, 3 L. Ed. 378.

⁷ *Carter v. Carter Coal Co.* (1936) 298 U. S. 238, 80 L. Ed. 1160, 56 S. Ct. 855.

⁸ "*Fifth.* The question whether such a delegation of legislative power is permitted by the Constitution is not answered by the argument that it should be assumed that the President has acted, and will act, for what he believes to be the public good. The point is not one of motives but of constitutional authority, for which the best of motives is not a substitute. While the present controversy relates to a delegation to the President, the basic question has a much wider application. If the Congress can make a grant of legislative authority of the sort attempted by § 9 (c), we find nothing in the Constitution which restricts the Congress to the selection of the President as grantee. The Congress may vest the power in the officer of its choice or in a board or commission such as it may select or create for the purpose. Nor, with respect to such a delegation, is the question concerned merely with the transportation of oil, or of oil produced in excess

of what the State may allow. If legislative power may thus be vested in the President, or other grantee, as to that excess of production, we see no reason to doubt that it may similarly be vested with respect to the transportation of oil without reference to the State's requirements. That reference simply defines the subject of the prohibition which the President is authorized to enact, or not to enact, as he pleases. And if that legislative power may be given to the President or other grantee, it would seem to follow that such power may similarly be conferred with respect to the transportation of other commodities in interstate commerce with or without reference to state action, thus giving to the grantee of the power the determination of what is a wise policy as to that transportation, and authority to permit or prohibit it, as the person, or board or commission, so chosen, may think desirable. In that view, there would appear to be no ground for denying a similar prerogative of delegation with respect to other subjects of legislation." (Mr. Chief Justice Hughes in *Panama Refining Co. v. Ryan* (1935) 293 U. S. 388, 420, 421, 79 L. Ed. 446, 55 S. Ct. 241.)

upon such a party confers, in effect, the power to regulate his competitors or an unwilling minority. This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business. Regulation is necessarily a governmental function, since, in the very nature of things, one person may not be entrusted with the power to regulate the business of another, and especially of a competitor.⁹ Whether the president of a private shipping company in competition with a complaining carrier can be the delegate of functions previously committed to the Shipping Board, has been expressly left open.¹⁰

D. Subject of Regulation

§ 21. Subject of the Regulation Must Be Defined.

The most fundamental question of delegation is whether there is an adequate definition of the subject to which the statute is addressed.¹¹ "Purpose of the Act" is used as a synonym for subject.¹²

A statute defines the subject which provides that "the President is authorized to prohibit the transportation in interstate and foreign commerce of petroleum and the products thereof in excess of the amount permitted to be produced or withdrawn from storage by any State law or valid regulation or order prescribed thereunder, by any . . . agency of a State."¹³ The subject is the transportation

⁹ *Carter v. Carter Coal Co.* (1936) 298 U. S. 238, 80 L. Ed. 1160, 56 S. Ct. 855.

¹⁰ *Isbrandtsen-Moller Co., Inc. v. United States* (1937) 300 U. S. 139, 81 L. Ed. 562, 57 S. Ct. 407.

¹¹ "The aspect in which the question is now presented is distinct from that which was before us in the case of the Panama Company. There, the subject of the statutory prohibition was defined. National Industrial Recovery Act, § 9 (c). That subject was the transportation in interstate and foreign commerce of petroleum and petroleum products which are produced or withdrawn from storage in excess of the amount permitted by state authority. The question was

with respect to the range of discretion given to the President in prohibiting that transportation. *Id.*, pp. 414, 415, 430. As to the 'codes of fair competition,' under § 3 of the Act, the question is more fundamental. It is whether there is any adequate definition of the subject to which the codes are to be addressed." (Mr. Chief Justice Hughes in *A. L. A. Schechter Poultry Corp. v. United States* (1935) 295 U. S. 495, 530, 531, 79 L. Ed. 1570, 55 S. Ct. 837, 97 A. L. R. 947.)

¹² *United States v. Rock Royal Cooperative, Inc.* (1939) 307 U. S. 533, 83 L. Ed. 1446, 59 S. Ct. 993.

¹³ Act of June 16, 1933, 48 Stat. 195, 200.

referred to.¹⁴ This statute, however, attempted invalid delegation because of the lack of a standard limiting the range of discretion given the President.¹⁵ The subject has been said to be defined where the purpose of the act is stated to be to "establish . . . orderly marketing conditions" which "will give agricultural commodities a purchasing power . . . equivalent to . . . the base period" of the act.¹⁶

A statute does not define the subject which authorizes the President to approve "Codes of Fair Competition" for industries if he finds they will "tend to effectuate the policy of this title," where the "Declaration of Policy" is a preface of generalities as to the rehabilitation, correction, and development of industry; and where "unfair competition" is not otherwise defined, and the context of the act shows that the phrase is not used in its common-law sense, nor as a synonym for another phrase.¹⁷

E. Standards

§ 22. Statute Must Establish Standards Limiting the Delegate.

Even if the subject is properly defined, attempted delegation will be invalid if it fails to set up a standard for the action of the delegate.¹⁸ Congress must, in the statute, establish the standards of legal obligation which will properly limit its delegate. Standards are rules of conduct to be applied to particular states of fact by appropriate administrative procedure.¹⁹ Thus the court looks to the statute to see whether Congress has itself established the standards of legal obligation, thus performing its essential legislative function, or by the failure to enact such standards has attempted to transfer that function to others.²⁰ Having laid down the general rules of action

¹⁴ *Panama Refining Co. v. Ryan* (1935) 293 U. S. 388, 79 L. Ed. 446, 55 S. Ct. 241.

¹⁵ See *Panama Refining Co. v. Ryan* (1935) 293 U. S. 388, 79 L. Ed. 446, 55 S. Ct. 241.

¹⁶ *United States v. Rock Royal Cooperative, Inc.* (1939) 307 U. S. 533, 83 L. Ed. 1446, 59 S. Ct. 993.

¹⁷ *A. L. A. Schechter Poultry Corp. v. United States* (1935) 295 U. S. 495, 79 L. Ed. 1570, 55 S. Ct. 837, 97 A. L. R. 947.

¹⁸ *A. L. A. Schechter Poultry Corp. v. United States* (1935) 295 U. S.

495, 79 L. Ed. 1570, 55 S. Ct. 837, 97 A. L. R. 947; *Panama Refining Co. v. Ryan* (1935) 293 U. S. 388, 79 L. Ed. 446, 55 S. Ct. 241.

¹⁹ *A. L. A. Schechter Poultry Corp. v. United States* (1935) 295 U. S. 495, 79 L. Ed. 1570, 55 S. Ct. 837, 97 A. L. R. 947; *United States v. Griffin* (D. C. S. D. Ga., Savannah Div., 1935) 12 F. Supp. 135 (Secy. of Agriculture).

²⁰ *A. L. A. Schechter Poultry Corp. v. United States* (1935) 295 U. S. 495, 79 L. Ed. 1570, 55 S. Ct. 837, 97 A. L. R. 947; *Panama Refining Co.*

under which an agency shall proceed, Congress may require of that agency the application of such rules to particular situations and the investigation of facts, with a view to making orders in a particular matter within the rules laid down by the Congress.²¹ The requirement of standards is most often referred to in the doctrine permitting delegation of certain power from a legislative source.²²

v. Ryan (1935) 293 U. S. 388, 79 L. Ed. 446, 55 S. Ct. 241.

21 Interstate Commerce Commission.

Interstate Commerce Commission v. Goodrich Transit Co. (1912) 224 U. S. 194, 56 L. Ed. 729, 32 S. Ct. 436. See also Delaware & Hudson Co. v. United States (D. C. S. D. N. Y. 1925) 5 F. (2d) 831.

Secretary of Agriculture.

United States v. Grimaud (1911) 220 U. S. 506, 55 L. Ed. 563, 31 S. Ct. 480; Edwards v. United States (C. C. A. 9th, 1937) 91 F. (2d) 767.

Secretary of War.

Union Bridge Co. v. United States (1907) 204 U. S. 364, 51 L. Ed. 523, 27 S. Ct. 367.

Tariff Commission.

J. W. Hampton Jr. & Co. v. United States (1928) 276 U. S. 394, 72 L. Ed. 624, 48 S. Ct. 348.

²² "To summarize and conclude upon this point: Section 3 of the Recovery Act is without precedent. It supplies no standards for any trade, industry or activity. It does not undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure. Instead of prescribing rules of conduct, it authorizes the making of codes to prescribe them. For that legislative undertaking, § 3 sets up no standards, aside from the statement of the general aims of rehabilitation, correction and expansion described in section one. In view of the scope of that broad declaration, and of the nature of the few restrictions that are im-

posed, the discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered. We think that the code-making authority thus conferred is an unconstitutional delegation of legislative power." (Mr. Chief Justice Hughes in *A. L. A. Schechter Poultry Corp. v. United States* (1935) 295 U. S. 495, 541, 542, 79 L. Ed. 1570, 55 S. Ct. 837, 97 A. L. R. 947.)

"Fourth. Section 9 (c) is assailed upon the ground that it is an unconstitutional delegation of legislative power. The section purports to authorize the President to pass a prohibitory law. The subject to which this authority relates is defined. It is the transportation in interstate and foreign commerce of petroleum and petroleum products which are produced or withdrawn from storage in excess of the amount permitted by state authority. Assuming for the present purpose, without deciding, that the Congress has power to interdict the transportation of that excess in interstate and foreign commerce, the question whether that transportation shall be prohibited by law is obviously one of legislative policy. Accordingly, we look to the statute to see whether the Congress has declared a policy with respect to that subject; whether the Congress has set up a standard for the President's action; whether the Congress has required any finding by the President in the exercise of the authority to enact the prohibition."

§ 23. — Adequate Standards: Examples.

Where power to act on particular matters "in the public interest" is delegated, and the act shows that the term is not a mere general reference to public welfare without any standard to guide determinations, but relates directly to particular matters of fact such as are commonly left for administrative determination, the delegation is not unconstitutional because of vagueness in the standards set up.²³ The

(Mr. Chief Justice Hughes in *Panama Refining Co. v. Ryan* (1935) 293 U. S. 388, 414, 415, 79 L. Ed. 446, 55 S. Ct. 241.)

"It is conceded by counsel that Congress may use executive officers in the application and enforcement of a policy declared in law by Congress, and authorize such officers in the application of the Congressional declaration to enforce it by regulation equivalent to law. But it is said that this never has been permitted to be done where Congress has exercised the power to levy taxes and fix customs duties. The authorities make no such distinction. The same principle that permits Congress to exercise its rate making power in interstate commerce, by declaring the rule which shall prevail in the legislative fixing of rates, and enables it to remit to a rate-making body created in accordance with its provisions the fixing of such rates, justifies a similar provision for the fixing of customs duties on imported merchandise. If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power." (Mr. Chief Justice Taft in *J. W. Hampton Jr. & Co. v. United States* (1928) 276 U. S. 394, 409, 72 L. Ed. 624 48 S. Ct. 348.

²³ "The criterion to be applied by the Commission in the exercise of its

authority to approve such transactions—a criterion reaffirmed by the amendments of Emergency Railroad Transportation Act, 1933—is that of the controlling public interest. And that term as used in the statute is not a mere general reference to public welfare, but, as shown by the context and purpose of the Act, 'has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities.' " (Mr. Chief Justice Hughes in *Texas v. United States* (1934) 292 U. S. 522, 531, 78 L. Ed. 1402, 54 S. Ct. 819.)

"Appellant insists that the delegation of authority to the Commission is invalid because the stated criterion is uncertain. That criterion is the 'public interest.' It is a mistaken assumption that this is a mere general reference to public welfare without any standard to guide determinations. The purpose of the Act, the requirements it imposes, and the context of the provision in question show the contrary. . . . The provisions now before us were among the additions made by Transportation Act, 1920, and the term 'public interest' as thus used is not a concept without ascertainable criteria, but has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities, questions to

same is true of "public convenience, interest or necessity" required in the granting of licenses.²⁴ Prohibition of "undue discrimination" in the charging of rates provides an adequate standard.²⁵ Where the subject is defined, a standard has been held to be sufficient which authorizes the Secretary of Agriculture to issue an order when he has "reason to believe that it will tend to effectuate the policy of the act," and which defines the Secretary's powers, limits the terms of orders to specific provisions, minutely set out, limits the commodities subject to orders, and requires a hearing and findings.²⁶

§ 24. — Inadequate Standards: Examples.

A statute sets up no standard for the delegate's action which merely provides that "the President is authorized to prohibit" the transportation of "hot oil" in interstate and foreign commerce, and nowhere else even gives a basis for a possible inference as to particular circumstances or conditions which are to govern the exercise of the authority conferred.²⁷ A statute sets up no standard where the delegate (the President) is free to approve, disapprove, or amend "Codes of Fair Competition" for industries, which are codes of laws, unless they tend to monopoly, and the only further requirement is a finding—really a mere statement of opinion—that the code will "tend to effectuate the policy" of the act, and the "Declaration of Policy" fails to define the subject of the statute and merely announces the

which the Interstate Commerce Commission has constantly addressed itself in the exercise of the authority conferred. So far as constitutional delegation of authority is concerned, the question is not essentially different from that which is raised by provisions with respect to reasonableness of rates, to discrimination, and to the issue of certificates of public convenience and necessity." (Mr. Chief Justice Hughes in *New York Central Securities Corp. v. United States* (1932) 287 U. S. 12, 24, 25, 77 L. Ed. 138, 53 S. Ct. 45.)

See James M. Landis in "The Administrative Process," (1938) p. 66.

²⁴ "In granting licenses the Commission is required to act 'as public convenience, interest or necessity re-

quires.' This criterion is not to be interpreted as setting up a standard so indefinite as to confer an unlimited power. Compare *N. Y. Central Securities Co. v. United States*, 287 U. S. 12, 24." (Mr. Chief Justice Hughes in *Federal Radio Commission v. Nelson Bros. Bond & Mtg. Co.* (1933) 289 U. S. 266, 285, 77 L. Ed. 1166, 53 S. Ct. 627, 89 A. L. R. 406.) See also § 564 et seq.

²⁵ *Intermountain Rate Cases* (1914) 234 U. S. 476, 58 L. Ed. 1408, 34 S. Ct. 986.

²⁶ *United States v. Rock Royal Co-operative, Inc.* (1939) 307 U. S. 533, 83 L. Ed. 1446, 59 S. Ct. 993.

²⁷ *Panama Refining Co. v. Ryan* (1935) 293 U. S. 388, 79 L. Ed. 446, 55 S. Ct. 241.

general aims of economic rehabilitation, correction, and expansion.²⁸ These restrictions leave virtually untouched the field of policy of the act, in which wide field of legislative policies the proponents of a code, refraining from monopolistic designs, may roam at will, and the President may approve or disapprove their proposals as he sees fit.²⁹

No standard is set up where legislation is intended to become effective upon the "event" of an agreement between certain private persons, in which "event" other private persons were to become subject to legal obligations. This would remove all restrictions upon the delegation of legislative power, as the making of laws could thus be referred to any designated officials or private persons whose orders or agreements would be treated as "events" with the result that they would be invested with the force of law having final sanctions.³⁰ Where, however, agreements of private parties are the *sine qua non* of the order, but not its source or cause, so that the private parties may be said to have the power of negation but not that of creation, there is no unlawful delegation of legislative power.³¹

§ 25. Standards Require Findings.

The fundamental requirement of standards as a requisite for the validity of a statute is coextensive with the fundamental requirement of clear findings by an administrative agency as a requisite for administrative application of the statutory mandate.³² A statute must set up a rule of conduct or policy for application by an agency to a particular state of fact, and findings must correspondingly show that such rule of conduct or policy applies to the particular type of fact described. If the statute sets up standards governing the exercise of the authority conferred, the delegate cannot act validly except within those standards; and findings by the delegate as to the existence of the required basis for its action are necessary to sustain that action.³³ Otherwise the case would still be one of an unfettered discretion, as

²⁸ A. L. A. Schechter Poultry Corp. v. United States (1935) 295 U. S. 495, 79 L. Ed. 1570, 55 S. Ct. 837, 97 A. L. R. 947.

²⁹ A. L. A. Schechter Poultry Corp. v. United States (1935) 295 U. S. 495, 79 L. Ed. 1570, 55 S. Ct. 837, 97 A. L. R. 947.

³⁰ Hughes, C. J., concurring in Carter v. Carter Coal Co. (1936) 298

U. S. 238, 80 L. Ed. 1160, 56 S. Ct. 855.

³¹ Edwards v. United States (C. C. A. 9th, 1937) 91 F. (2d) 767.

³² See § 550 et seq.

³³ Wichita Railroad & Light Co. v. Public Utilities Commission (1922) 260 U. S. 48, 67 L. Ed. 124, 43 S. Ct. 51. See also Edwards v. United States (C. C. A. 9th, 1937) 91 F. (2d) 767.

the qualification of authority would be ineffectual.³⁴ A statute is invalid which only requires findings as to a small part of the subject of the statute, leaving virtually untouched the legislative possibilities in its declaration of policy, and which requires a further "finding" that the action taken "will tend to effectuate the policy of this title," which is really a mere statement of opinion.³⁵

Likewise, standards stated in broad terms, such as "public interest," and "public convenience and necessity," being limited in meaning to the concrete policies or rules of conduct laid down in the act, require basic findings as to those policies or rules of conduct. As they do not have a vague reference to the public welfare, mere echo of the phrase is not enough.^{35a}

F. Examples of Valid Delegation

§ 26. Historical Development.

Since Congress cannot abdicate its essential legislative functions, whenever it delegates powers to an agency it must define the subject of the statute and set up standards to control the exercise of those powers—otherwise it has attempted an unconstitutional delegation. This has been the rule from the beginning of the constitutional system. The first instance of delegation was in the Act of June 4, 1794³⁶ which authorized the President, in stated circumstances, to lay and revoke embargoes. It has been consistently applied to the neutrality legislation following that act, the first case being *The Brig Aurora*,³⁷ to the President's power to suspend or alter a tariff act upon a contingency to be ascertained by him,³⁸ to delegations to cabinet members, and, increasingly in recent years, to delegations to other administrative agencies.³⁹

§ 27. To the President: The Embargo Acts.

The Supreme Court has had frequent occasion to refer to the limitations of the authority to delegate and to review the course of

³⁴ *Panama Refining Co. v. Ryan* (1935) 293 U. S. 388, 79 L. Ed. 446, 55 S. Ct. 241.

³⁵ *A. L. A. Schechter Poultry Corp. v. United States* (1935) 295 U. S. 495, 79 L. Ed. 1570, 55 S. Ct. 837, 97 A. L. R. 947.

^{35a} See § 564 et seq.

³⁶ 1 Stat. 372.

³⁷ (1813) 7 Cranch (11 U. S.) 382, 3 L. Ed. 378.

³⁸ *J. W. Hampton Jr. & Co. v. United States* (1928) 276 U. S. 394, 72 L. Ed. 624, 48 S. Ct. 348.

³⁹ *A. L. A. Schechter Poultry Corp. v. United States* (1935) 295 U. S. 495, 79 L. Ed. 1570, 55 S. Ct. 837, 97 A. L. R. 947; *Panama Refining Co. v. Ryan* (1935) 293 U. S. 388, 79 L. Ed. 446, 55 S. Ct. 241.

congressional action. At the very outset, amid the disturbances due to war in Europe, when the national safety was imperiled and our neutrality was disregarded, Congress passed a series of acts, beginning in 1794, as a part of which the President was authorized, in stated circumstances, to lay and revoke embargoes, to give permits for the exportation of arms and military stores, to remit and discontinue the restraints and prohibitions imposed by acts suspending commercial intercourse with certain countries, and to permit or interdict the entrance into waters of the United States of armed vessels belonging to foreign nations. The first case relating to an authorization of this description was that of *The Brig Aurora*,⁴⁰ This decision held that it was competent to make the revival of an act depend upon the proclamation of the President, showing the ascertainment by him of the requisite fact.⁴¹

§ 28. — The Tariff Acts.

In *Marshall Field & Co. v. Clark*⁴² the Supreme Court applied the ruling of *The Brig Aurora*⁴³ to the case of the suspension of an act upon a contingency to be ascertained by the President. Section 3 of the Act of October 1, 1890⁴⁴ provided that, with a view to secure reciprocal trade with foreign countries, the President might, whenever he deemed the duties of any country reciprocally unequal, suspend the free introduction of certain of its products into the United States. The court held the delegation valid, and said that the President was the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect.⁴⁵

In *J. W. Hampton Jr. & Co. v. United States*⁴⁶ the question related to the "flexible tariff provision" of the Tariff Act of 1922.⁴⁷ The Supreme Court held that Congress had described its plan of customs duties equal to the difference in cost of production between a foreign

⁴⁰ (1813) 7 Cranch (11 U. S.) 382, 3 L. Ed. 378.

⁴¹ *Panama Refining Co. v. Ryan* (1935) 293 U. S. 388, 79 L. Ed. 446, 55 S. Ct. 241; *Marshall Field & Co. v. Clark* (1892) 143 U. S. 649, 36 L. Ed. 294, 12 S. Ct. 495.

⁴² (1892) 143 U. S. 649, 36 L. Ed. 294, 12 S. Ct. 495.

⁴³ (1813) 7 Cranch (11 U. S.) 382, 3 L. Ed. 378.

⁴⁴ 26 Stat. 567, 612.

⁴⁵ *Panama Refining Co. v. Ryan* (1935) 293 U. S. 388, 79 L. Ed. 446, 55 S. Ct. 241; *Marshall Field & Co. v. Clark* (1892) 143 U. S. 649, 692, 693, 36 L. Ed. 294, 12 S. Ct. 495.

⁴⁶ (1928) 276 U. S. 394, 72 L. Ed. 624, 48 S. Ct. 348.

⁴⁷ 42 Stat. 858, 941.

country and the United States. As the differences might vary, provision was made for the investigation and determination of these by the executive branch (the President aided by the Tariff Commission) so as to make the adjustment necessary to conform to the standard underlying that policy and plan.⁴⁸ The Court found the same principle to be applicable in fixing customs duties as that which permitted Congress to exercise its rate-making power in interstate commerce, by declaring the rule which shall prevail in the legislative fixing of rates and then remitting the fixing of rates in accordance with its provisions to a rate-making body. The Court fully recognized the limitations upon the delegation of legislative power.⁴⁹

§ 29. — Trading with the Enemy Act.

The authority given to the President, as Commander-in-Chief, by the Trading with the Enemy Act⁵⁰ to determine the terms of sales of enemy properties in the light of facts and conditions from time to time arising in the progress of war was not the making of a law; it was the application of the general rule laid down by the Act, and was hence sustained.⁵¹

§ 30. To the Secretary of the Treasury: Exclusion of Inferior Imports.

In *Buttfield v. Stranahan*⁵² the Act of March 2, 1897⁵³ was upheld, which authorized the Secretary of the Treasury, upon the recommendation of a board of experts, to establish uniform standards of purity, quality and fitness for teas imported into the United States. The court construed the statute as expressing the purpose to exclude the lowest grades of tea. Congress thus fixed a primary standard, and committed to the Secretary of the Treasury the mere executive duty

⁴⁸ *A. L. A. Schechter Poultry Corp. v. United States* (1935) 295 U. S. 495, 79 L. Ed. 1570, 55 S. Ct. 837, 97 A. L. R. 947; *J. W. Hampton Jr. & Co. v. United States* (1928) 276 U. S. 394, 72 L. Ed. 624, 48 S. Ct. 348.

⁴⁹ *A. L. A. Schechter Poultry Corp. v. United States* (1935) 295 U. S. 495, 79 L. Ed. 1570, 55 S. Ct. 837, 97 A. L. R. 947; *J. W. Hampton Jr. & Co. v. United States* (1928) 276 U. S. 394, 72 L. Ed. 624, 48 S. Ct. 348; *Frischer & Co., Inc. v. Bakelite Corp.*

(Ct. Cust. & Pat. App. 1930) 39 F. (2d) 247, cert. den. 282 U. S. 852, 75 L. Ed. 755, 51 S. Ct. 29.

⁵⁰ Act of March 23, 1918, 40 Stat. 460, 50 USCA (App.) 12.

⁵¹ *Panama Refining Co. v. Ryan* (1935) 293 U. S. 388, 79 L. Ed. 446, 55 S. Ct. 241; *United States v. Chemical Foundation* (1926) 272 U. S. 1, 71 L. Ed. 131, 47 S. Ct. 1.

⁵² (1904) 192 U. S. 470, 48 L. Ed. 525, 24 S. Ct. 349.

⁵³ 29 Stat. 604, 21 USCA 41-50.

to effectuate the legislative policy declared in the statute. Congress legislated on the subject as far as was reasonably practicable, and from the necessities of the case was compelled to leave to executive officials the duty of bringing about the result pointed out by the statute.⁵⁴

§ 31. To the Secretary of War: Obstructions to Navigation.

The Secretary of War is given the authority to determine whether bridges and other structures constitute unreasonable obstructions to navigation and to remove such obstructions. In the Act of March 3, 1899⁵⁵ Congress declared a general rule and imposed upon the Secretary of War the duty of ascertaining what particular cases came within the rule as thus laid down.⁵⁶ Thus the statute requiring alteration of a bridge may be applied upon a finding that a particular bridge obstructs navigation.⁵⁷

§ 32. To the Secretary of Agriculture.

In *United States v. Grimaud*⁵⁸ a regulation of the Secretary of Agriculture requiring permits to graze sheep in government forests was involved. The Supreme Court referred to the various acts for the establishment and management of forest reservations and the authorization of rules which would insure the objects of the reservation, that is "to regulate their occupancy and use and to preserve the forests thereon from destruction." The court observed that it was impracticable for Congress to provide general regulations for these various and varying details of management, and that, in authorizing the Secretary to meet local conditions, Congress was merely conferring administrative functions upon an agent, and not delegating to him legislative power.⁵⁹ The court quoted with approval the statement of the principle in *Marshall Field & Co. v. Clark*⁶⁰

⁵⁴ *Panama Refining Co. v. Ryan* (1935) 293 U. S. 388, 79 L. Ed. 446, 55 S. Ct. 241. See also *Red "C" Oil Co. v. Board of Agriculture* (1912) 222 U. S. 380, 394, 56 L. Ed. 240, 32 S. Ct. 152.

⁵⁵ 30 Stat. 1121, 1153, 1154, 33 USCA 411-418, 502.

⁵⁶ *Panama Refining Co. v. Ryan* (1935) 293 U. S. 388, 79 L. Ed. 446, 55 S. Ct. 241.

⁵⁷ *Monongahela Bridge Co. v. United*

States (1910) 216 U. S. 177, 54 L. Ed. 435, 30 S. Ct. 356; *Union Bridge Co. v. United States* (1907) 204 U. S. 364, 51 L. Ed. 523, 27 S. Ct. 367.

⁵⁸ (1911) 220 U. S. 506, 55 L. Ed. 563, 31 S. Ct. 480.

⁵⁹ *United States v. Grimaud* (1911) 220 U. S. 506, 55 L. Ed. 563 31 S. Ct. 480.

⁶⁰ (1892) 143 U. S. 649, 36 L. Ed. 294, 12 S. Ct. 495.

that Congress cannot delegate legislative power, and upheld the regulation in question as an administrative rule for the appropriate execution of the policy laid down in the statute.⁶¹ Where Congress has set forth its policy for the establishment of standards of tobacco according to type, grade, size, condition and other determinable characteristics, a provision that the Secretary of Agriculture shall make investigations to that end and fix the standards according to kind and quality is plainly appropriate and a valid delegation.⁶² Delegation of power to make regulations under the Migratory Bird Treaty Act is a valid delegation, the policy being declared to be the protection of the birds, and a further standard being that the regulations shall be compatible with the terms of the Migratory Game Bird Treaty.⁶³

§ 33. To the Interstate Commerce Commission.

By the Interstate Commerce Act ⁶⁴ Congress itself provided a code of laws. To facilitate the application of the standards prescribed by the Act, Congress provided an expert body. That administrative agency, in dealing with particular cases, is required to act upon notice and hearing, and its orders must be supported by findings of fact as to the existence of those standards which in turn are sustained by evidence.⁶⁵ Upon this principle rests the authority of the Commission in the execution of the declared policy of Congress in enforcing reasonable rates, in preventing undue preferences and unjust discriminations, in requiring suitable facilities for transportation in interstate commerce, and in exercising other powers held to have been validly conferred.⁶⁶ When the Commission is authorized to issue a certificate of public convenience and necessity, or to permit the acquisition by one carrier of the control of another if in the public interest, these provisions are not left without standards to guide determination. The

⁶¹ *Panama Refining Co. v. Ryan* (1935) 293 U. S. 388, 79 L. Ed. 446, 55 S. Ct. 241.

⁶² *Currin v. Wallace* (1939) 306 U. S. 1, 83 L. Ed. 441, 59 S. Ct. 379.

⁶³ *United States v. Griffin* (D. C. S. D. Ga., Savannah Div., 1935) 12 F. Supp. 135 (Secy. of Agriculture); *Shouse v. Moore* (D. C. E. D. Ky. 1935) 11 F. Supp. 784 (Secy. of Agriculture).

⁶⁴ 49 USCA 1 et seq.

⁶⁵ *A. L. A. Schechter Poultry Corp. v. United States* (1935) 295 U. S. 495, 79 L. Ed. 1570, 55 S. Ct. 837, 97 A. L. R. 947.

⁶⁶ *Panama Refining Co. v. Ryan* (1935) 293 U. S. 388, 79 L. Ed. 446, 55 S. Ct. 241; *Avent v. United States* (1924) 266 U. S. 127, 69 L. Ed. 202, 45 S. Ct. 34; *Delaware & Hudson Co. v. United States* (D. C. S. D. N. Y. 1925) 5 F. (2d) 831.

authority conferred has direct relation to the policies concretely prescribed and can be exercised only upon findings based upon evidence with respect to particular conditions of transportation.⁶⁷ The Motor Carrier Act is another example of valid delegation of power to the Interstate Commerce Commission.⁶⁸

§ 34. To the Federal Trade Commission.

The Federal Trade Commission is an administrative body created by Congress to carry into effect legislative policies embodied in the act creating it in accordance with the legislative standard therein prescribed.⁶⁹ The Federal Trade Commission Act⁷⁰ introduced the expression "unfair methods of competition" which was new in the law. It did not admit of precise definition, its scope being left to judicial determination by the gradual process of inclusion and exclusion, as controversies arise.⁷¹ What are "unfair methods of competition" are thus to be determined in particular instances, upon evidence, in the light of particular competitive conditions and of what is found to be a specific and substantial public interest.⁷² To make this possible Congress set up a special procedure. A commission, a quasi-judicial body, was created. Provision was made for formal complaint, for notice and hearing for appropriate findings of fact as to the standards set up in the statute, supported by adequate evidence, and for judicial review to give assurance that the action of the Commission is taken

⁶⁷ A. L. A. Schechter Poultry Corp. v. United States (1935) 295 U. S. 495, 79 L. Ed. 1570, 55 S. Ct. 837, 97 A. L. R. 947.

⁶⁸ Charles Noeding Trucking Co. v. United States (D. C. N. J. 1939) 29 F. Supp. 537.

⁶⁹ Humphrey v. United States (1935) 295 U. S. 602, 79 L. Ed. 1611, 55 S. Ct. 869.

⁷⁰ Act of September 26, 1914, 38 Stat. 717, 719, 720, 15 USCA 41 et seq.

⁷¹ A. L. A. Schechter Poultry Corp. v. United States (1935) 295 U. S. 495, 79 L. Ed. 1570, 55 S. Ct. 837, 97 A. L. R. 947; Federal Trade Commission v. R. F. Keppel & Bro. (1934) 291 U. S. 304, 78 L. Ed. 814, 54 S. Ct. 423;

Federal Trade Commission v. Raladam Co. (1931) 283 U. S. 643, 75 L. Ed. 1324, 51 S. Ct. 587, 79 A. L. R. 1191.

⁷² A. L. A. Schechter Poultry Corp. v. United States (1935) 295 U. S. 495, 79 L. Ed. 1570, 55 S. Ct. 837, 97 A. L. R. 947; Federal Trade Commission v. R. F. Keppel & Bro. (1934) 291 U. S. 304, 78 L. Ed. 814, 54 S. Ct. 428; Federal Trade Commission v. Algoma Lumber Co. (1934) 291 U. S. 67, 78 L. Ed. 655, 54 S. Ct. 315; Federal Trade Commission v. Raladam Co. (1931) 283 U. S. 643, 75 L. Ed. 1324, 51 S. Ct. 587, 79 A. L. R. 1191; Federal Trade Commission v. Klesner (1929) 280 U. S. 19, 74 L. Ed. 138, 50 S. Ct. 1, 68 A. L. R. 838.

within its statutory authority.⁷³ In administering the provisions of the statute in respect to "unfair methods of competition"—that is to say in filling in and administering the details embodied in that general standard, the Commission acts in part quasi-legislatively, and in part quasi-judicially.⁷⁴

§ 35. To the Federal Radio Commission.

The Federal Radio Act of 1927 (now superseded)⁷⁵ provided for assignments of frequencies or wave lengths to various stations. In granting licenses the Radio Commission was required to act as "public convenience, interest or necessity" required. In construing this provision the Supreme Court found that the statute itself declared the policy as to equality of radio broadcasting service, and that it conferred authority to make allocations in order to secure this equality according to stated criteria. The standard set up and so limited was not so indefinite as to confer unlimited power.⁷⁶ The authority conferred was limited by the nature of radio communications, and by the scope, character, and quality of services to be rendered and the relative advantages to be derived through the distribution of facilities. The standards established by Congress were to be enforced upon hearing and evidence, by an administrative body acting under statutory restrictions, adapted to the particular activity.⁷⁷

§ 36. To the Federal Communications Commission.

The successor statute to the Radio Act of 1927,—the Communications Act of 1934, amended in 1937,⁷⁸ has for its subject, *inter alia*,

⁷³ A. L. A. Schechter Poultry Corp. v. United States (1935) 295 U. S. 495, 79 L. Ed. 1570, 55 S. Ct. 837, 97 A. L. R. 947; Federal Trade Commission v. Raladam Co. (1931) 283 U. S. 643, 75 L. Ed. 1324, 51 S. Ct. 587, 79 A. L. R. 1191; Federal Trade Commission v. Klesner (1929) 280 U. S. 19, 74 L. Ed. 138 50 S. Ct. 1.

⁷⁴ Humphrey v. United States (1935) 295 U. S. 602, 79 L. Ed. 1611, 55 S. Ct. 869.

⁷⁵ 44 Stat. 1162, as amended by Act 1928, 45 Stat. 373, 47 USCA 89 (repealed 48 Stat. 1102).

⁷⁶ Panama Refining Co. v. Ryan (1935) 293 U. S. 388, 79 L. Ed. 446, 55 S. Ct. 241; Federal Radio Commission v. Nelson Bros. Bond & Mtg. Co. (1933) 289 U. S. 266, 77 L. Ed. 1166, 53 S. Ct. 627, 89 A. L. R. 406.

⁷⁷ A. L. A. Schechter Poultry Corp. v. United States (1935) 295 U. S. 495, 79 L. Ed. 1570, 55 S. Ct. 837, 97 A. L. R. 947; Federal Radio Commission v. Nelson Bros. Bond & Mtg. Co. (1933) 289 U. S. 266, 77 L. Ed. 1166, 53 S. Ct. 627, 89 A. L. R. 406.

⁷⁸ 48 Stat. 1064, 50 Stat. 189, 47 USCA 35, 151 et seq.

the regulation of radio broadcasting.⁷⁹ It formulates a unified and comprehensive regulatory system for the industry. The standard of the Act is "public convenience, interest or necessity," which standard is likewise limited by the concrete policies specifically laid down in the Act. It sets up the Federal Communications Commission and gives it power to issue or withhold permits to build stations and licenses, running three years or less, to operate stations. The subordinate questions of procedure in ascertaining the public interest when application is made for licenses are left explicitly and by implication to the Federal Communications Commission, so long, of course, as it observes the basic requirements designed for the protection of private as well as public interest. These questions include the scope of the inquiry, whether applications should be heard contemporaneously or successively, whether parties should be allowed to intervene in one another's proceedings, and similar questions.⁸⁰

§ 37. Particular Legislative Functions Delegated.

Among other functions the fixing of rates,⁸¹ the prescribing of divisions of rates,⁸² fixing market prices of milk,⁸³ setting the standards for required safety appliances,⁸⁴ are all legislative functions which have been delegated to administrative agencies. The alteration, within absolute limits, of tariff rates set by Congress, is a legislative power delegable to the President to be exercised upon the advice of a commission. The advisory function of a commission is not necessary to the delegation of legislative power.⁸⁵

III. PROCEDURAL DUE PROCESS

§ 38. In General.

Procedural due process, apart from questions of delegation, is an extensive subject and is treated elsewhere.⁸⁶ A constitutional question

⁷⁹ Another subject is interstate telephone communication. See *Rochester Telephone Corp. v. United States* (1939) 307 U. S. 125, 83 L. Ed. 1147, 59 S. Ct. 754.

⁸⁰ *Federal Communications Commission v. Pottsville Broadcasting Co.* (1940) 309 U. S. 134, 84 L. Ed. 656, 60 S. Ct. 437.

⁸¹ See *Arizona Grocery Co. v. Atchison, T. & S. F. R. Co.* (1932) 284 U. S. 370, 76 L. Ed. 348, 52 S. Ct. 183.

⁸² *Baltimore & O. R. Co. v. United*

States (1936) 298 U. S. 349, 80 L. Ed. 1209, 56 S. Ct. 797.

⁸³ *United States v. Rock Royal Cooperative, Inc.* (1939) 307 U. S. 533, 83 L. Ed. 1446, 59 S. Ct. 993.

⁸⁴ *St. Louis, I. M. & S. R. Co. v. Taylor* (1908) 210 U. S. 281, 52 L. Ed. 1061, 28 S. Ct. 616.

⁸⁵ *J. W. Hampton Jr. & Co. v. United States* (1928) 276 U. S. 394, 72 L. Ed. 624, 48 S. Ct. 348.

⁸⁶ See § 274 et seq.

with regard to a statute setting up an administrative scheme is whether the delegation of powers has been made with the proper safeguards of due process: whether the statute prescribes the fundamentals of fair play.⁸⁷ If there are "inherent constitutional defects" such as impossible conditions upon a claimant in the scheme of administrative procedure, an aggrieved party need not resort to an administrative remedy but may pursue his legal remedy and attack the statute as unconstitutional.⁸⁸

Defects of procedural due process are equally obnoxious whether occurring in statutory provisions or simply committed by an administrative agency in the absence of specific statutory provisions for the conduct of administrative proceedings. In the latter instance relief by an aggrieved party may only be had upon judicial review. But where a statute expressly provides for a step of administrative procedure which does not comply with the requirements of procedural due process, a party affected need not resort to the administrative scheme or exhaust the stipulated administrative remedy,⁸⁹ but may pursue his judicial remedy, based on the invalidity of the statute immediately.⁹⁰

§ 39. Statutes Which Deny Procedural Due Process.

Procedural due process may be denied by a statute which establishes an agency and gives it powers without providing proper procedure for the making of the agency's determinations, or procedural due process may be denied by a statute which establishes an agency and gives it powers, but provides that there shall be no judicial review. But resort to a court must be denied. A statute which merely gives an election between final determination by a court or an agency does not deny due process,⁹¹ nor does one which makes no special provision for judicial consideration of the reasonableness of rates on the issue of confiscation, when such resort to the courts exists under the Judicial Code. It is only where such opportunity is withheld that the provision violates the Constitution.⁹²

⁸⁷ Federal Communications Commission v. Pottsville Broadcasting Co. (1940) 309 U. S. 134, 84 L. Ed. 656, 60 S. Ct. 437.

⁸⁸ Anniston Mfg. Co. v. Davis (1937) 301 U. S. 337, 347, 81 L. Ed. 1143, 57 S. Ct. 816. See also Chicago, M. & St. P. R. Co. v. Minnesota (1890) 134 U. S. 418, 33 L. Ed. 970, 10 S. Ct. 462.

⁸⁹ See § 233.

⁹⁰ See Anniston Mfg. Co. v. Davis (1937) 301 U. S. 337, 81 L. Ed. 1143, 57 S. Ct. 816.

⁹¹ Booth Fisheries Co. v. Industrial Commission (1926) 271 U. S. 208, 70 L. Ed. 908, 46 S. Ct. 491.

⁹² Dayton-Goose Creek R. Co. v. United States (1924) 263 U. S. 456, 68 L. Ed. 388, 44 S. Ct. 169.

§ 40. Procedural Due Process: Examples.

Title VII of the Revenue Act of 1936, §§ 901-917,⁹³ sets up a constitutional procedure for claiming refunds of processing taxes from the Commissioner of Internal Revenue. There is a proper hearing, determination of all questions of fact, and protection of the legal rights of the claimant. The Commissioner's disallowance of a claim for refund is final unless petition for a hearing by the Board of Review is filed within three months. The Board contains nine members, chosen by the Secretary of the Treasury from his department. It determines the amount of refund in a hearing conducted by one of its members or by a Treasury employee, in which the rules of evidence are those of the District of Columbia in equity cases. Parties have the right to counsel and to examine witnesses. Proposed findings are made within six months of the end of the hearing, findings of fact and decision are in writing and there is judicial review in the Circuit Court of Appeals, on the administrative record. The Court may affirm, modify, or reverse, with or without remanding to the Commissioner, and may take additional evidence. There is no vice in setting up a rebuttable presumption that the tax is due.⁹⁴ A state statute does not deny due process of law when it requires all claimants to the same water upon a river to make their claims in a single statutory proceeding, having its earlier stages before an administrative agency, and its later ones before a state court, where the duties of the agency are like those of a referee, where evidence taken before it must be of evidential value and can be reviewed in the court, which can take other evidence, where there is provision for notice and hearing at every material step in the proceeding, and where the operation of the agency's order, otherwise effective pending court adjudication, may be stayed by posting a bond, the amount to be set by a judge.⁹⁵ A state statute does not deny due process of law or the equal protection of the laws which requires, before a change in rates is ordered, a hearing, the consideration of the relevant statements, evidence, and arguments submitted, and a determination by the Commission whether the existing rates are excessive.⁹⁶ Where the legislature of a state instead of fixing a tax itself, commits to some subordinate body the duty of determining in what

⁹³ 49 Stat. 1747, 7 USCA 623n, 644-646.

(1916) 241 U. S. 440, 60 L. Ed. 1084, 36 S. Ct. 637.

⁹⁴ *Anniston Mfg. Co. v. Davis* (1937) 301 U. S. 337, 81 L. Ed. 1143, 57 S. Ct. 816.

⁹⁶ *Louisville & N. R. Co. v. Garrett* (1913) 231 U. S. 298, 58 L. Ed. 229, 34 S. Ct. 48.

⁹⁵ *Pacific Live Stock Co. v. Lewis*

amount, and upon whom the tax shall be levied, and of making its assessment and apportionment, due process of law requires that at some stage of the proceedings, before the tax becomes irrevocably fixed, the taxpayer shall have an opportunity to be heard, of which he must have notice, either personal, by publication, or by a law fixing the time and place of the hearing.⁹⁷

IV. EXERCISE OF THE JUDICIAL POWER

A. *In General: Judicial Review*

§ 41. In General.

Under Article III, section 2 of the Constitution the judicial power is vested in the courts and extends to "cases" and "controversies" arising under the Constitution or laws of the United States.⁹⁸ This principle, interpreted according to the doctrine of separation of powers and based upon the foundation of the common law, the supremacy of

⁹⁷ *Londoner v. Denver* (1908) 210 U. S. 373, 52 L. Ed. 1103, 28 S. Ct. 708.

⁹⁸ "It therefore becomes necessary to inquire what is meant by the judicial power thus conferred by the Constitution upon this court, and with the aid of appropriate legislation upon the inferior courts of the United States. 'Judicial power,' says Mr. Justice Miller in his work on the Constitution, 'is the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision.' Miller on the Constitution, 314.

"As we have already seen by the express terms of the Constitution, the exercise of the judicial power is limited to 'cases' and 'controversies.' Beyond this it does not extend, and unless it is asserted in a case or controversy within the meaning of the Constitution, the power to exercise it is nowhere conferred.

"What, then, does the Constitution mean in conferring this judicial power with the right to determine 'cases' and 'controversies'? A 'case' was de-

fined by Mr. Chief Justice Marshall as early as the leading case of *Marbury v. Madison*, 1 Cranch, 137, to be a suit instituted according to the regular course of judicial procedure. And what more, if anything, is meant in the use of the term 'controversy'? That question was dealt with by Mr. Justice Field, at the circuit, in the case of *In re Pacific Railway Commission*, 32 Fed. Rep. 241, 255. Of these terms that learned Justice said:

"The judicial article of the Constitution mentions cases and controversies. The term 'controversies,' if distinguishable at all from 'cases,' is so in that it is less comprehensive than the latter, and includes only suits of a civil nature. *Chisholm v. Georgia*, 2 Dall. 431, 432; 1 Tuck. Bl. Comm. App. 420, 421. By cases and controversies are intended the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs. Whenever the claim of a party under the Constitution, laws, or treaties of

law itself,⁹⁹ is responsible for the doctrine of judicial review, which is unknown under the civil law.

Although administrative agencies may act in a quasi-judicial capacity, they do not exercise judicial functions.¹ Their determinations, not being judgments, are not subject to appeal (in the strict sense), writ of error, or certiorari.² While administrative agencies are analogous to judicial fact-finding bodies, and may be used to determine questions of fact if there is provision for procedural due process, they are not, like the judicial bodies, subject to the constant superintendence of a court.³ This distinction is of controlling importance where questions of a fundamental character are in issue.⁴ It means that, since there is not constant court supervision, there must be court review on questions of law. Appeal may be limited to questions of law, but those questions cannot be taken from the courts.⁵ Judicial review requires

the United States takes such a form that the judicial power is capable of acting upon it, then it has become a case. The term implies the existence of present or possible adverse parties whose contentions are submitted to the court for adjudication.' '' (Mr. Justice Day in *Muskra v. United States* (1911) 219 U. S. 346, 356, 357, 55 L. Ed. 246, 31 S. Ct. 250.)

⁹⁹ See § 3.

¹ *Degge v. Hitchcock* (1913) 229 U. S. 162, 57 L. Ed. 1135, 33 S. Ct. 639; *Tracy v. Commissioner of Internal Revenue* (C. C. A. 6th, 1931) 53 F. (2d) 575, cert. den. 287 U. S. 632, 77 L. Ed. 548, 53 S. Ct. 83. See also *Federal Trade Commission v. Eastman Kodak Co.* (1927) 274 U. S. 619, 71 L. Ed. 1238, 47 S. Ct. 688.

² *Degge v. Hitchcock* (1913) 229 U. S. 162, 57 L. Ed. 1135, 33 S. Ct. 639.

³ *Crowell v. Benson* (1932) 285 U. S. 22, 76 L. Ed. 598, 52 S. Ct. 285.

⁴ *Crowell v. Benson* (1932) 285 U. S. 22, 76 L. Ed. 598, 52 S. Ct. 285.

⁵ *Crowell v. Benson* (1932) 285 U. S. 22, 76 L. Ed. 598, 52 S. Ct. 285; *Highland Farms Dairy, Inc. v. Agnew* (D. C. E. D. Va. 1936) 16 F. Supp. 575, aff'd 300 U. S. 608, 81 L. Ed. 835, 57

S. Ct. 549.

"A federal court cannot fix rates nor make divisions of joint rates nor relieve from the long-short haul clause nor formulate car practices. So here it is immaterial that the court itself cannot approve or disapprove the transfer. The court has power to pass judgment upon challenged principles of law insofar as they are relevant to the disposition made by the Commission. '* * * a judgment rendered will be a final and indisputable basis of action between the commission and the defendant.' *Interstate Commerce Comm. v. Baird*, 194 U. S. 25, 38. In making such a judgment the court does not intrude upon the province of the Commission, while the constitutional requirements of 'Case' or 'Controversy' are satisfied. For purposes of judicial finality there is no more reason for assuming that a Commission will disregard the direction of a reviewing court than that a lower court will do so." (Mr. Justice Frankfurter in *Federal Power Commission v. Pacific Power & Light Co.* (1939) 307 U. S. 156, 160, 83 L. Ed. 180, 59 S. Ct. 766.)

"If the questions of law thus presented were brought before the Court

that every question of law which a party to an administrative proceeding is entitled to raise be judicially decided. A review limited to questions of statutory construction or mere regularity of procedure is

by suit to restrain the enforcement of an invalid administrative order, there could be no question as to the judicial character of the proceeding. But that character is not altered by the mere fact that remedy is afforded by appeal. The controlling question is whether the function to be exercised by the Court is a judicial function, and, if so, it may be exercised on an authorized appeal from the decision of an administrative body. We must not 'be misled by a name, but look to the substance and intent of the proceeding.' *United States v. Ritchie*, 17 How. 525, 534; *Stephens v. Cherokee Nation*, 174 U. S. 445, 479; *Federal Trade Commission v. Eastman Co.*, 274 U. S. 619, 623; *Old Colony Trust Co. v. Commissioner*, 279 U. S. 716, 722-724. 'It is not important,' we said in *Old Colony Trust Co. v. Commissioner*, *supra*, 'whether such a proceeding was originally begun by an administrative or executive determination, if when it comes to the court, whether legislative or constitutional, it calls for the exercise of only the judicial power of the court upon which jurisdiction has been conferred by law.' Nor is it necessary that the proceeding to be judicial should be one entirely *de novo*. When on the appeal, as here provided, the parties come before the Court of Appeals to obtain its decision upon the legal question whether the Commission has acted within the limits of its authority, and to have their rights, as established by law, determined accordingly, there is a case or controversy which is the appropriate subject of the exercise of judicial power. The provision that, in case the Court reverses the decision of the Commission,

'it shall remand the case to the Commission to carry out the judgment of the Court' means no more than that the Commission in its further action is to respect and follow the Court's determination of the questions of law. The procedure thus contemplates a judicial judgment by the Court of Appeals and this Court has jurisdiction, on certiorari, to review that judgment in order to determine whether or not it is erroneous.'" (*Mr. Chief Justice Hughes in Federal Radio Commission v. Nelson Bros. Bond & Mtg. Co.* (1933) 289 U. S. 266, 277, 278, 77 L. Ed. 1166, 53 S. Ct. 627, 89 A. L. R. 406.)

"There can be no question but that courts must exercise the judicial power vested in them to determine the legal validity of administrative action, where the validity of such action is involved in questions properly before them, whether they have been granted the right of review over action of the administrative agency or not. The duty necessarily arises because of their obligation to decide cases before them according to law. See *Shields v. Utah Idaho Cent. R. R. Co.*, 305 U. S. 177, 83 L. Ed. 111, 59 S. Ct. 160; *Crowell v. Benson*, 285 U. S. 22, 58, 59, 76 L. Ed. 598, 52 S. Ct. 285; *United States v. Passavant*, 169 U. S. 16, 42 L. Ed. 644, 18 S. Ct. 219; *St. Louis Smelting & Ref. Co. v. Kemp*, 104 U. S. 636, 641, 26 L. Ed. 875; *United States v. Haviland & Co.*, 2 Cir., 177 F. 175.'" (*Judge Parker, in David L. Moss Co. v. United States* (C. C. A. 4th, 1939) 103 F. (2d) 395, 397.)

"(2) The contention based upon the judicial power of the United States, as extended 'to all cases of

not proper judicial review.⁶ Judicial review of administrative agencies operates in an area not defined with special reference to the agencies, but by the application of the traditional criteria for bringing judicial action into play. Partly these have been written into Article III of the Constitution by what is implied from the grant of "judicial power" to determine "cases," and "controversies." Partly they are an aspect of the procedural philosophy pertaining to the federal courts.⁷ It is not important whether the proceeding was originally begun by an administrative or by an executive determination, if, when it comes to the court, whether legislative or constitutional, it calls for the exercise of only the judicial power of the court upon which jurisdiction has been conferred by law. Nor is it necessary that the proceeding, to be judicial, should be one entirely *de novo*.⁸ The controlling question is whether the function to be exercised by the court is a judicial function. The court must not be misled by a name, but look to the substance and intent of the proceeding.^{8a}

When parties come before a court to obtain its decision upon the legal question whether the agency has acted within the limits of its

admiralty and maritime jurisdiction' (Const. Art. III), presents a distinct question. In *Murray v. Hoboken Land & Improvement Co.*, 18 How. 272, 284, this Court, speaking through Mr. Justice Curtis, said: 'To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination.' ' (Mr. Chief Justice Hughes in *Crowell v. Benson* (1932) 285 U. S. 22, 48, 49, 76 L. Ed. 598, 52 S. Ct. 285.)

⁶ "We think that this plan of procedure provides for the judicial determination of every question of law which the claimant is entitled to raise. We find nothing in the statute which

limits the judicial review to questions of statutory construction or of mere regularity of procedure. The 'law,' with which the decision of the Board may be in conflict, may be the fundamental law. Questions of validity as well as of statutory authority or regularity may be determined. These may relate to due process in the hearing or in the refusal of a refund. (Mr. Chief Justice Hughes in *Annis-ton Mfg. Co. v. Davis* (1937) 301 U. S. 337, 345, 81 L. Ed. 1143, 57 S. Ct. 816.)

⁷ *Rochester Telephone Corp. v. United States* (1939) 307 U. S. 125, 83 L. Ed. 1147, 59 S. Ct. 754.

⁸ *Federal Radio Commission v. Nelson Bros. Bond & Mtg. Co.* (1933) 289 U. S. 266, 77 L. Ed. 1166, 53 S. Ct. 627, 89 A. L. R. 406.

^{8a} *Federal Radio Commission v. Nelson Bros. Bond & Mtg. Co.* (1933) 289 U. S. 266, 77 L. Ed. 1166, 53 S. Ct. 627, 89 A. L. R. 406.

authority, and to have their rights, as established by law, determined accordingly, there is a case or controversy which is the appropriate subject of the exercise of judicial power.⁹ Hence Congress cannot withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or in admiralty.¹⁰ Conversely Congress cannot constitutionally give administrative jurisdiction to the Supreme Court.¹¹

⁹ Federal Radio Commission v. Nelson Bros. Bond & Mtg. Co. (1933) 289 U. S. 266, 77 L. Ed. 1166, 53 S. Ct. 627, 89 A. L. R. 406; *Commissioner of Internal Revenue v. Liberty Bank & Trust Co. (C. C. A. 6th, 1932) 59 F. (2d) 320.

¹⁰ Crowell v. Benson (1932) 285 U. S. 22, 76 L. Ed. 598, 52 S. Ct. 285.

¹¹ Federal Radio Commission v. Nelson Bros. Bond & Mtg. Co. (1933) 289 U. S. 266, 77 L. Ed. 1166, 53 S. Ct. 627, 89 A. L. R. 406.

"In the cases just cited, as also in others, it is recognized that the courts of the District of Columbia are not created under the judiciary article of the Constitution but are legislative courts, and therefore that Congress may invest them with jurisdiction of appeals and proceedings such as have been just described.

"But this Court cannot be invested with jurisdiction of that character, whether for purposes of review or otherwise. It was brought into being by the judiciary article of the Constitution, is invested with judicial power only and can have no jurisdiction other than of cases and controversies falling within the classes enumerated in that article. It cannot give decisions which are merely advisory; nor can it exercise or participate in the exercise of functions which are essentially legislative or administrative." (Mr. Justice Van Devanter in Federal Radio Commission v. General Electric Co. (1930) 281 U. S. 464, 468, 469, 74 L. Ed. 969,

50 S. Ct. 389.)

"Such legislative or administrative jurisdiction, it is well settled can not be conferred on this Court either directly or by appeal. The latest and fullest authority upon this point is to be found in the opinion of Mr. Justice Day, speaking for the Court in *Muskrat v. United States*, 219 U. S. 346. The principle there recognized and enforced on reason and authority is that the jurisdiction of this Court and of the inferior courts of the United States ordained and established by Congress under and by virtue of the third article of the Constitution is limited to cases and controversies in such form that the judicial power is capable of acting on them and does not extend to an issue of constitutional law framed by Congress for the purpose of invoking the advice of this Court without real parties or a real case, or to administrative or legislative issues or controversies." (Mr. Chief Justice Taft in *Keller v. Potomac Electric Power Co.* (1923) 261 U. S. 428, 444, 67 L. Ed. 731, 43 S. Ct. 445.)

"By these provisions it is made plain that the Court of Claims, originally nothing more than an administrative or advisory body, was converted into a court, in fact as well as in name, and given jurisdiction over controversies which were susceptible of judicial cognizance. It is only in that view that the appellate jurisdiction of this court in respect of the judgments of that court could be

While appeal from an agency's determination may be limited by statute to questions of law,¹² in any event the reviewing court has jurisdiction to deny effect to any administrative order which is beyond the jurisdiction of the agency,¹³ and to any finding which is without evidence, or contrary to the indisputable character of the evidence, or wherever an administrative hearing is inadequate, or unfair, or arbitrary in any respect.¹⁴ Where an order is alleged to be confiscatory, there must be clear and definite statutory provision of a fair opportunity to have the independent judgment of a court upon the law and the facts as to this constitutional question, otherwise the order is void.¹⁵

A state may not by statute limit judicial review of the orders of state administrative agencies so as to deprive non-residents of judicial review in the federal courts.¹⁶

§ 42. Development of Judicial Review.

The rules of judicial review^{16a} have been developed by our courts in a line of decisions since 1792. The first case in this process of exposition, *Hayburn's Case*,¹⁷ invoked the doctrine of separation of powers in order to set the boundary between judges and commissioners whose duty it was to take evidence and make awards which were subject to final action by the Secretary of War. From then on the doctrine has been regarded as governing whenever a question of the relative scope of judicial activity and that of other agencies of government has

sustained, or *concurrent* jurisdiction appropriately be conferred upon the federal district courts. The Court of Claims, therefore, undoubtedly, in entertaining and deciding these controversies, exercises judicial power, but the question still remains—and is the vital question—whether it is the judicial power defined by Art. III of the Constitution." (Mr. Justice Sutherland in *Williams v. United States* (1933) 289 U. S. 553, 565, 77 L. Ed. 1372, 53 S. Ct. 751.)

¹² *Crowell v. Benson* (1932) 285 U. S. 22, 76 L. Ed. 598, 52 S. Ct. 285.

¹³ *Crowell v. Benson* (1932) 285 U. S. 22, 76 L. Ed. 598, 52 S. Ct. 285.

Thus, in a valuation case, even if there is no confiscation, an order is invalid if the agency adopted a

method of valuation not directed by statute and thus exceeded the authority delegated. *St. Louis & O'Fallon R. Co. v. United States* (1929) 279 U. S. 461, 73 L. Ed. 798, 49 S. Ct. 384.

¹⁴ *Crowell v. Benson* (1932) 285 U. S. 22, 76 L. Ed. 598, 52 S. Ct. 285; *Tracy v. Commissioner of Internal Revenue* (C. C. A. 6th, 1931) 53 F. (2d) 575, cert. den. 287 U. S. 632, 77 L. Ed. 548, 53 S. Ct. 83.

¹⁵ *Ohio Valley Water Co. v. Ben Avon Borough* (1920) 253 U. S. 287, 64 L. Ed. 908, 40 S. Ct. 527.

¹⁶ *Palmolive Co. v. Conway* (D. C. W. D. Wis. 1930) 37 F. (2d) 114.

^{16a} See Book III, § 187 et seq.

¹⁷ (1792) 2 Dallas (2 U. S.) 409, 1 L. Ed. 436.

arisen. In the last half-century, and with increasing frequency recently, the agencies whose activity has raised the question most often have been administrative. And the question is still resolved by applying the traditional criteria.¹⁸

§ 43. A Requisite of Statutory Administrative Schemes.

A valid statutory scheme of administration usually provides that rulings of the agency upon questions of law are without finality, and affords opportunity for their decision by the courts.¹⁹ Administrative orders are legislative in their nature, and any party affected by such legislative action has been said to be entitled, by the due process clause, to a judicial review of the question as to whether he has been thereby deprived of a right protected by the Constitution.²⁰ But failure to provide expressly for an appeal to any court from the final order of an agency, or for a judicial review of the reasonableness of prescribed rates, does not make a state statute void, where the statute does not deny the right of access to the courts for the purpose of determining any matter which would be the appropriate subject of judicial inquiry.²¹ If the agency establishes rates that are confiscatory, an appropriate mode of obtaining relief is by bill in equity to restrain the enforcement of the order. Presumably the courts of the state, as well as the federal courts, would be open to a party for this

¹⁸ *Rochester Telephone Corp. v. United States* (1939) 307 U. S. 125, 83 L. Ed. 1147, 59 S. Ct. 754.

¹⁹ *Board of Review (Treasury Department).*

Anniston Mfg. Co. v. Davis (1937) 301 U. S. 337, 81 L. Ed. 1143, 57 S. Ct. 816. See also § 425.

Federal Trade Commission.

Federal Trade Commission v. Raladam Co. (1931) 283 U. S. 643, 75 L. Ed. 1324, 51 S. Ct. 587, 79 A. L. R. 1191; *Federal Trade Commission v. Klesner* (1929) 280 U. S. 19, 74 L. Ed. 138, 50 S. Ct. 1, 68 A. L. R. 838.

National Labor Relations Board.

Myers v. Bethlehem Shipbuilding Corp. (1938) 303 U. S. 41, 82 L. Ed. 638, 58 S. Ct. 459; *National Labor Relations Board v. Jones & Laughlin Steel Corp.* (1937) 301 U. S. 1, 81 L.

Ed. 893, 57 S. Ct. 615, 108 A. L. R. 1352.

The President.

A. L. A. Schechter Poultry Corp. v. United States (1935) 295 U. S. 495, 79 L. Ed. 1570, 55 S. Ct. 837, 97 A. L. R. 947.

State Agencies.

Southern R. Co. v. Virginia (1933) 290 U. S. 190, 78 L. Ed. 260, 54 S. Ct. 148.

Workmen's Compensation Cases.

Crowell v. Benson (1932) 285 U. S. 22, 76 L. Ed. 598, 52 S. Ct. 285.

²⁰ *Wadley Southern R. Co. v. Georgia* (1915) 235 U. S. 651, 59 L. Ed. 405, 35 S. Ct. 214.

²¹ *Louisville & N. R. Co. v. Garrett* (1913) 231 U. S. 298, 58 L. Ed. 229, 34 S. Ct. 48.

purpose without express statutory provision to that effect.²² In whatever method enforced, the right to a judicial review must be substantial, adequate, and safely available, not nominal and illusory, as where penalties prevent the exercise of the right.²³ The right must be availed of with reasonable promptness.²⁴ Where Congress does not attempt to define questions of law, but reserves to the court full authority to pass on all matters which the Supreme Court has held to fall within that category, this is not an attempt to interfere with, but provision to facilitate, the exercise by the court of its jurisdiction to deny effect to any administrative finding which is without evidence, or contrary to the indisputable character of the evidence, or where the hearing is inadequate, unfair, or arbitrary in any respect.²⁵ A state must provide a fair opportunity, where confiscation by an administrative order is claimed, of submitting that issue to a judicial tribunal for its own independent judgment on the law and the facts. Otherwise the order is void. The opportunity to test the order must be clear and definite to oblige a party to proceed thereunder or lose his constitutional rights. It is not so, for example, where the appeal to the court is judicial in character but the court cannot substitute its own judgment upon the items alleged to be confiscatory for that of the commission, where the latter is supported by substantial evidence. Such a court's jurisdiction stops short of what must be entrusted to some court so that there will be due process of law.²⁶

Where administrative orders cannot cause deprivation of liberty or property, as with orders requiring the making of periodical reports, the fact that the judicial review provided may be so onerous as to be impracticable has been held no ground to invalidate the orders.²⁷

§ 44. Statutes Which Provide for Judicial Review.

In the Radio Act of 1927,^{27a} as amended in 1928^{27b} (since repealed),²⁸ review was expressly limited to "questions of law." It was

²² *Louisville & N. R. Co. v. Garrett* (1913) 231 U. S. 298, 58 L. Ed. 229, 34 S. Ct. 48.

²³ *Wadley Southern R. Co. v. Georgia* (1915) 235 U. S. 651, 59 L. Ed. 405, 35 S. Ct. 214. See also § 49.

²⁴ *Wadley Southern R. Co. v. Georgia* (1915) 235 U. S. 651, 59 L. Ed. 405, 35 S. Ct. 214.

²⁵ *Crowell v. Benson* (1932) 285 U. S. 22, 76 L. Ed. 598, 52 S. Ct. 285.

²⁶ *Ohio Valley Water Co. v. Ben Avon Borough* (1920) 253 U. S. 287, 64 L. Ed. 908, 40 S. Ct. 527.

²⁷ *Bartlett Frazier Co. v. Hyde* (C. C. A. 7th, 1933) 65 F. (2d) 350, cert. den. 290 U. S. 654, 78 L. Ed. 567, 54 S. Ct. 70.

^{27a} 44 Stat. 1162.

^{27b} 45 Stat. 373, 1551.

²⁸ 48 Stat. 1102.

provided that "the findings of fact by the commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the commission are arbitrary or capricious," and that if the court reversed the commission "it shall remand the case to the commission to carry out the judgment of the court." This provides for purely judicial review.²⁹ The remand provision means no more than that the commission in the further action is to respect and follow the court's determination of the questions of law.³⁰ Similarly the Communications Act, § 13(e)³¹ now provides that, in reviewing the orders of the Radio Commission's successor, the Federal Communications Commission, the "... court shall hear ... [the] appeal, and ... have power upon ... [the] record, to enter a judgment affirming or reversing the decision of the Commission, it shall remand the case to the Commission to carry out the judgment of the court ... The court's judgment shall be final, subject ... to review by the Supreme Court ..." Such review is purely judicial.³²

The Prohibition Act³³ provided that a disappointed applicant for a liquor permit "may have a review of the decision by a court of equity," which may "affirm, modify, or reverse" a finding of the Commissioner of Internal Revenue "as the facts and law of the case may warrant." By this statute Congress did not undertake to vest in the court the administrative function of determining whether or not the permit should be granted; this provision is to be construed, in the light of the well-established rule in analogous cases, as merely giving the court authority to determine, whether, upon the facts and law, the action of the Commissioner is based upon an error of law, or is wholly unsupported by the evidence, or clearly arbitrary or capricious.³⁴ Court review is not legislative, but judicial, where the court has power to reverse or affirm, in whole or in part, and to take evi-

²⁹ Federal Communications Commission v. Pottsville Broadcasting Co. (1940) 309 U. S. 134, 84 L. Ed. 656, 60 S. Ct. 437; Federal Radio Commission v. Nelson Bros. Bond & Mtg. Co. (1933) 289 U. S. 266, 77 L. Ed. 1166, 53 S. Ct. 627, 89 A. L. R. 406.

³⁰ Federal Radio Commission v. Nelson Bros. Bond & Mtg. Co. (1933) 289 U. S. 266, 77 L. Ed. 1166, 56 S. Ct. 627, 89 A. L. R. 406. See also § 788 et seq.

³¹ 47 USCA 402 (e).

³² Federal Communications Commission v. Pottsville Broadcasting Co. (1940) 309 U. S. 134, 84 L. Ed. 656, 60 S. Ct. 437; Federal Radio Commission v. Nelson Bros. Bond & Mtg. Co. (1933) 289 U. S. 266, 77 L. Ed. 1166, 53 S. Ct. 627, 89 A. L. R. 406.

³³ 41 Stat. 305, 27 USCA 1.

³⁴ Ma-King Products Co. v. Blair (1926) 271 U. S. 479, 70 L. Ed. 1046, 46 S. Ct. 544.

dence additional to that introduced before the administrative agency whose action is under review. These are powers not uncommonly possessed by appellate courts in proceedings strictly judicial. They do not imply that the court may exercise legislative or administrative discretion. They are a common incident in judicial review of taxation.³⁵ Where a statute setting up a remedy provides that a court is only to enjoin excessive tax assessments, and not to make administrative assessment, the proceeding is judicial, not administrative.³⁶

Where a state statute provides that the court shall "on [its] own independent judgment . . . determine whether or not the findings made and the valuation and rates fixed by the Commission are reasonable and proper," and the court modifies the order, such review is still sufficiently judicial in character to permit an appeal to the United States Supreme Court.^{36a}

B. Legislative Review

§ 45. In General.

A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. Legislation on the other hand, looks to the future and changes existing conditions by making a new rule to be applied thereafter. The establishment of a rate is the making of a rule for the future.³⁷ Legislative review is in sharp contrast to judicial review. It exists where the reviewing court can substitute its own judgment upon administrative questions for that of the agency, thus becoming "a superior and revising agency in the same field,"³⁸ which is

³⁵ *Hill v. Martin* (1935) 296 U. S. 393, 80 L. Ed. 293, 56 S. Ct. 278.

³⁶ *Bohler v. Callaway* (1925) 267 U. S. 479, 69 L. Ed. 745, 45 S. Ct. 431.

For a further instance of judicial review, see *Pacific Telephone & Telegraph Co. v. Kuykendall* (1924) 265 U. S. 196, 68 L. Ed. 975, 44 S. Ct. 553.

^{36a} *Clark's Ferry Bridge Co. v. Public Service Commission* (1934) 291 U. S. 227, 234, 78 L. Ed. 767, 54 S. Ct. 427.

³⁷ *Keller v. Potomac Electric Power Co.* (1923) 261 U. S. 428 67 L. Ed. 731, 43 S. Ct. 445.

See Maurice H. Merrill in "Does 'Legislative Review' by Courts in Appeals from Public Utility Commissions

Constitute Due Process of Law?" (1926) 1 Ind. L. Jour. 247.

³⁸ *Southwestern Bell Telephone Co. v. Oklahoma* (1938) 303 U. S. 206, 82 L. Ed. 751, 58 S. Ct. 528; **Federal Radio Commission v. General Electric Co.* (1930) 281 U. S. 464, 74 L. Ed. 969, 50 S. Ct. 389; *Keller v. Potomac Electric Power Co.* (1923) 261 U. S. 428, 67 L. Ed. 731, 43 S. Ct. 445; *Kansas City Southern R. Co. v. Cornish* (C. C. A. 10th, 1933) 65 F. (2d) 671.

See Oklahoma Constitution, Article IX, § 23.

"What is the nature of the power thus conferred on the District Supreme

equivalent to saying that the reviewing body may weigh the evidence.³⁹ Thus where a state statute provides that a state court may set aside, modify or affirm an administrative order, as the proofs might require by weighing the evidence, such review is legislative, not judicial, and must be exhausted before judicial relief in the federal courts is sought.⁴⁰ A state statute may provide for legislative review of administrative action by a state court, even though such legislative review is denominated a proceeding in equity.⁴¹ Legislative review is appeal in the chancery sense, and to be distinguished from judicial review, which is limited to questions of law only. While controverted facts may be considered upon judicial review to determine what the question of law is, any finding of fact by an agency, if supported by evidence, is final and conclusive on the court.⁴²

The fact that the same court also exercises purely judicial functions in other cases does not affect the nature of the review. Although constitutional courts cannot be given jurisdiction in legislative review, original or appellate, since such review does not present a "case" or "controversy" upon which the judicial power can act,⁴³ the Court of Appeals of the District of Columbia, a constitutional court,⁴⁴ may be vested with administrative as well as judicial juris-

Court? Is it judicial or is it legislative? Is the court to pass solely on questions of law, and look to the facts only to decide what are the questions of law really arising, or to consider whether there was any showing of facts before the Commission upon which, as a matter of law, its finding can be justified? Or has it the power, in this equitable proceeding to review the exercise of discretion by the Commission and itself raise or lower valuations, rates, or restrict or expand orders as to service? Has it the power to make the order the Commission should have made? If it has, then the court is to exercise legislative power in that it will be laying down new rules, to change present conditions and to guide future action and is not confined to definition and protection of existing rights." (Mr. Chief Justice Taft in *Keller v. Potomac Electric Power Co.* (1923) 261 U. S.

428, 440, 67 L. Ed. 731, 43 S. Ct. 445.)

³⁹ * *Porter v. Investors Syndicate* (1932) 286 U. S. 461, 76 L. Ed. 1226, 52 S. Ct. 617.

⁴⁰ *Porter v. Investors Syndicate* (1932) 286 U. S. 461, 76 L. Ed. 1226, 52 S. Ct. 617.

⁴¹ *Porter v. Investors Syndicate* (1932) 286 U. S. 461, 76 L. Ed. 1226, 52 S. Ct. 617.

⁴² *Keller v. Potomac Electric Power Co.* (1923) 261 U. S. 428, 67 L. Ed. 731, 43 S. Ct. 445.

⁴³ *Federal Radio Commission v. Nelson Bros. Bond & Mtg. Co.* (1933) 289 U. S. 266, 77 L. Ed. 1166, 53 S. Ct. 627, 89 A. L. R. 406; *Federal Radio Commission v. General Electric Co.* (1930) 281 U. S. 464, 74 L. Ed. 969, 50 S. Ct. 389; *Keller v. Potomac Electric Power Co.* (1923) 261 U. S. 428, 67 L. Ed. 731, 43 S. Ct. 445.

⁴⁴ Earlier statements to the contrary overruled, *O'Donoghue v. United*

diction. In regard to the District of Columbia Congress exercises a dual power, that of a national legislature and that of a state.⁴⁵ It was given, under the Radio Act of 1927,⁴⁶ power to take additional evidence and to "alter or revise the decision appealed from and enter such judgment as to it may seem just." Since such determinations were not judicial, they were not "cases" or "controversies" within the meaning of the judiciary article of the Constitution and there could be no appeal to the Supreme Court.⁴⁷ Since it would have been an improper exercise of original jurisdiction, a suit for an injunction would not lie in the Supreme Court. The only remaining possibility was a suit in the District Court of the District of Columbia, where the Radio Commission was located. This would be appealable to the Court of Appeals, the very court whose determination was attacked. Dissatisfaction with this situation led to an amendment setting up purely judicial review.⁴⁸

Where legislative review is available, it must be exhausted before judicial relief may be sought.⁴⁹

§ 46. Statutes Which Provide for Legislative Review.

The Federal Radio Act of 1927,⁵⁰ subsequently amended and later superseded,⁵¹ provided that determinations of the Federal Radio Commission "shall be final, subject to the right of appeal" to the Court of Appeals of the District of Columbia, which could take additional evidence upon such terms and conditions as it may deem proper, and which "shall hear, review, and determine the appeal upon said record and evidence, and may alter or revise the decision appealed from and enter such judgment as to it may seem just." The Commission's powers were purely administrative, and the provision for appeals to the Court of Appeals of the District of Columbia did no more than make that court a superior and revising agency in the same field. The

States (1933) 289 U. S. 516, 77 L. Ed. 1356, 53 S. Ct. 740.

⁴⁵ O'Donoghue v. United States (1933) 289 U. S. 516, 77 L. Ed. 1356, 53 S. Ct. 740; Keller v. Potomac Electric Power Co. (1923) 261 U. S. 428, 67 L. Ed. 731, 43 S. Ct. 445.

⁴⁶ 44 Stat. 1162 et seq.

⁴⁷ Federal Radio Commission v. General Electric Co. (1930) 281 U. S. 464, 74 L. Ed. 969, 50 S. Ct. 389.

⁴⁸ 46 Stat. 844.

Federal Communications Commission v. Pottsville Broadcasting Co. (1940) 309 U. S. 134, 84 L. Ed. 656, 60 S. Ct. 437; Federal Radio Commission v. Nelson Bros. Bond & Mtg. Co. (1933) 289 U. S. 266, 77 L. Ed. 1166, 53 S. Ct. 627, 89 A. L. R. 406.

⁴⁹ See § 226.

⁵⁰ 44 Stat. 1162.

⁵¹ The Communications Act of 1934, 47 USCA 151-609.

function of the court in such case was not judicial, but legislative.⁵² The action of the court in assessing costs against the Commission did not alter the legislative nature of the proceeding. It is therefore not reviewable in the Supreme Court which is a constitutional court, invested with judicial power only, and which cannot be invested with jurisdiction of a legislative character whether for purposes of review or otherwise.⁵³

The Oklahoma Constitution⁵⁴ provides that the State Supreme Court may make any order which the Corporation Commission could have made, and that such shall be substituted for the Commission's order. Such legislative decisions are not *res judicata*⁵⁵ and cannot be appealed to the United States Supreme Court.⁵⁶

§ 47. Legislative Courts.

The Constitution requires that Congress neither withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at common law, or in equity, or in admiralty, nor bring under the judicial power a matter which, from its nature, is not a subject for judicial determination.⁵⁷ However, all questions of fact which were not the subjects of such suits may be tried in proceedings which are not of judicial cognizance, the choice of method of their trial or determination being within the complete control of Congress. Thus legislative courts may be created as special tribunals to examine and determine various matters arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it. The mode of determining matters of this class is completely within congressional control. Congress may reserve to itself the power to decide, may delegate that power to executive officers or other administrative agencies, to legislative courts, or to judicial tribunals.⁵⁸

Article III, § 2, of the Constitution does not express the full authority of Congress to create courts. Other articles invest Congress with

⁵² Federal Radio Commission v. General Electric Co. (1930) 281 U. S. 464, 74 L. Ed. 969, 50 S. Ct. 389.

For a further instance of legislative review, see Pacific Telephone & Telegraph Co. v. Kuykendall (1924) 265 U. S. 196, 68 L. Ed. 975, 44 S. Ct. 553.

⁵³ Federal Radio Commission v. General Electric Co. (1930) 281 U. S. 464, 74 L. Ed. 969, 50 S. Ct. 389.

⁵⁴ Art. 9, § 23.

⁵⁵ Oklahoma Packing Co. v. Oklahoma Gas & Electric Co. (1940) 309 U. S. 4, 84 L. Ed. 537, 60 S. Ct. 215.

⁵⁶ Southwestern Bell Telephone Co. v. Oklahoma (1938) 303 U. S. 206, 82 L. Ed. 751, 58 S. Ct. 528.

⁵⁷ See § 5.

⁵⁸ See § 5.

powers in the exertion of which it may create inferior courts and clothe them with functions deemed essential or helpful in carrying these powers into execution. Thus a legislative court may be given jurisdiction of a proceeding which is not a "case" or "controversy" within Article III, section 2 of the Constitution.⁵⁹

A legislative court may either determine appropriate questions of fact, or review, in a legislative capacity, the determinations of such questions by an administrative agency. The judges of a legislative court are not subject to constitutional provisions as to tenure⁶⁰ or salary of office.⁶¹ The test of the nature of a court is not the intent of Congress, but the power under which the court is created and the jurisdiction conferred upon it.⁶² Besides the Court of Customs Appeals and the Court of Claims, examples of such courts are the courts of the Territories, the Court of Private Land Claims, the Choctaw and Chickasaw Citizenship Court, and the United States Court for China.⁶³ The

⁵⁹ "While Article III of the Constitution declares, in section 1, that the judicial power of the United States shall be vested in one Supreme Court and in 'such inferior courts as the Congress may from time to time ordain and establish,' and prescribes, in section 2, that this power shall extend to cases and controversies of certain enumerated classes, it long has been settled that Article III does not express the full authority of Congress to create courts, and that other Articles invest Congress with powers in the exertion of which it may create inferior courts and clothe them with functions deemed essential or helpful in carrying those powers into execution. But there is a difference between the two classes of courts. Those established under the specific power given in section 2 of Article III are called constitutional courts. They share in the exercise of the judicial power defined in that section, can be invested with no other jurisdiction, and have judges who hold office during good behavior, with no power in Congress to provide otherwise. On the other hand, those created

by Congress in the exertion of other powers are called legislative courts. Their functions always are directed to the execution of one or more of such powers and are prescribed by Congress independently of section 2 of Article III; and their judges hold for such term as Congress prescribes, whether it be a fixed period of years or during good behavior." (Mr. Justice Van Devanter in *Ex parte Bakelite Corp.* (1929) 279 U. S. 438, 449, 73 L. Ed. 789, 49 S. Ct. 411.)

⁶⁰ *Ex parte Bakelite Corp.* (1929) 279 U. S. 438, 73 L. Ed. 789, 49 S. Ct. 411.

⁶¹ *Williams v. United States* (1933) 289 U. S. 553, 77 L. Ed. 1372, 53 S. Ct. 751.

⁶² *Ex parte Bakelite Corp.* (1929) 279 U. S. 438, 73 L. Ed. 789, 49 S. Ct. 411.

⁶³ *Ex parte Bakelite Corp.* (1929) 279 U. S. 438, 73 L. Ed. 789, 49 S. Ct. 411.

Wilber G. Katz in "Federal Legislative Courts," (1930) 43 Harv. L. Rev. 894; "The Judicial Power of Federal Tribunals Not Organized Under Article Three," (1934) 34 Co-

Court of Claims has jurisdiction of certain claims against the government, and is reviewed in the Supreme Court,⁶⁴ although suits on such claims are *ex gratia* and hence not suits at common law nor matters requiring judicial determination.⁶⁵

§ 48. Legislative Courts May Also Afford Judicial Review.

Whether the court is legislative or judicial is not important, if the proceeding calls for the exercise of only the judicial power of the court.⁶⁶ Legislative courts may exercise judicial power.⁶⁷ Thus judicial review may occur in legislative courts. For instance determinations of the Tariff Commission are subject to appeal to the Court

Columbia L. Rev. 746; "The Restrictive Effect of Article Three on the Organization of Federal Courts," (1934) 34 Columbia L. Rev. 344; see "The Judicial Power of Federal Tribunals Not Organized Under Article Three," (1934) 34 Columbia L. Rev. 746; and see also note "Reduction of Salaries of Judges of District of Columbia and Court of Claims," (1933) 47 Harv. L. Rev. 133.

"The United States Court for China and the consular courts are legislative courts created as a means of carrying into effect powers conferred by the Constitution respecting treaties and commerce with foreign countries. They exercise their functions within particular districts in foreign territory and are invested with a large measure of jurisdiction over American citizens in those districts. The authority of Congress to create them and to clothe them with such jurisdiction has been upheld by this Court and is well recognized." (Mr. Justice Van Devanter in *Ex parte Bakelite Corp.* (1929) 279 U. S. 438, 451, 73 L. Ed. 789, 49 S. Ct. 411.)

⁶⁴ *Williams v. United States* (1933) 289 U. S. 553, 77 L. Ed. 1372, 53 S. Ct. 751.

⁶⁵ *Ex parte Bakelite Corp.* (1929) 279 U. S. 438, 73 L. Ed. 789, 49 S. Ct. 411.

⁶⁶ *Federal Radio Commission v. Nelson Bros. Bond & Mtg. Co.* (1933) 289 U. S. 266, 77 L. Ed. 1166, 53 S. Ct. 627, 89 A. L. R. 406.

⁶⁷ "That judicial power apart from that article may be conferred by Congress upon legislative courts, as well as upon constitutional courts, is plainly apparent from the opinion of Chief Justice Marshall in *American Insurance Co. v. Canter*, 1 Pet. 511, 546, dealing with the territorial courts. 'The jurisdiction,' he said, 'with which they are invested, is not a part of that judicial power which is defined in the 3d article of the Constitution, but is conferred by Congress, in the execution of those general powers which that body possesses over the territories of the United States.' That is to say (1) that the courts of the territories (and, of course, other legislative courts) are invested with judicial power, but (2) that this power is not conferred by the third article of the Constitution, but by Congress in the execution of other provisions of that instrument. The validity of this view is borne out by the fact that the appellate jurisdiction of this court over judgments and decrees of the legislative courts has been upheld and freely exercised under acts of Congress from a very early period, a practice which

of Customs Appeals on questions of law affecting the findings.⁶⁸ Likewise the states may unite judicial and legislative power in a single hand.⁶⁹ But the guaranties of the Fourteenth Amendment do not entitle a party to the exercise by the courts of such extra-judicial authority.⁷⁰

Where a state court appoints commissioners of a road district and levies assessments based upon their estimates, such proceedings are in the main legislative and administrative. But the decision of the issue

can be sustained, as already suggested, only upon the theory that the legislative courts possess and exercise judicial power—as distinguished from legislative, executive, or administrative power—although not conferred in virtue of the third article of the Constitution.” (Mr. Justice Sutherland in *Williams v. United States* (1933) 289 U. S. 553, 565, 566, 77 L. Ed. 1372, 53 S. Ct. 751.)

“This court has repeatedly held that the territorial courts are ‘legislative’ courts, created in virtue of the national sovereignty or under Art. IV, § 3, cl. 2, of the Constitution, vesting in Congress the power ‘to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States’; and that they are not invested with any part of the judicial power defined in the third article of the Constitution. And this rule, as it affects the territories, is no longer open to question. . . .

“The authority upon which all the later cases rest is *American Insurance Co. v. Canter*, 1 Pet. 511, 546, where the opinion was delivered by Chief Justice Marshall. The pertinent question there was whether the judicial power of the United States described in Art. III of the Constitution vested in the superior courts of the Territory of Florida; and it was answered in the negative. ‘The Judges of the Superior Courts of Florida,’ the court said, ‘hold their offices for four years. These Courts, then, are not constitutional

Courts, in which the judicial power conferred by the Constitution on the general government, can be deposited. They are incapable of receiving it. They are legislative Courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States. The jurisdiction with which they are invested, is not a part of that judicial power which is defined in the 3rd article of the Constitution, but is conferred by Congress, in the execution of those general powers which that body possesses over the territories of the United States.’” (Mr. Justice Sutherland in *O’Donoghue v. United States* (1933) 289 U. S. 516, 535, 536, 77 L. Ed. 1356, 53 S. Ct. 740.)

⁶⁸ *Ex parte Bakelite Corp.* (1929) 279 U. S. 438, 73 L. Ed. 789, 49 S. Ct. 411.

⁶⁹ *Keller v. Potomac Electric Power Co.* (1923) 261 U. S. 428, 67 L. Ed. 731, 43 S. Ct. 445; *Commissioners of Road Improvement Dist. No. 2 v. St. Louis Southwestern R. Co.* (1922) 257 U. S. 547, 66 L. Ed. 364, 42 S. Ct. 250; *Louisville & N. R. Co. v. Garrett* (1913) 231 U. S. 298, 58 L. Ed. 229, 34 S. Ct. 48. See *Pacific Live Stock Co. v. Lewis* (1916) 241 U. S. 440, 60 L. Ed. 1084, 36 S. Ct. 637.

⁷⁰ *Louisville & N. R. Co. v. Garrett* (1913) 231 U. S. 298, 58 L. Ed. 229, 34 S. Ct. 48.

between the road district and individual landowners as to benefits and damages from the improvement fulfills the definition of a judicial inquiry if made by a court. It is thus a suit at common law within section 28 of the Judicial Code⁷¹ and removable to the federal court.⁷² The inquiry is judicial. It is to declare and enforce liability as it stands on present and past facts under a law and rules already made. The issues are separable from benefits and damages to other owners. There are all the elements of judicial controversy; adversary parties, and an issue in which the claim of one of the parties against the other capable of pecuniary estimation, is stated and answered in some form of pleading and is to be concluded.⁷³ But a public proceeding, involving all claimants to the same water, which is merely preliminary and administrative, though the agency acts in a quasi-judicial capacity, is not judicial, and not removable.⁷⁴

C. Infliction of Penalties Pending Review

§ 49. Pending Judicial Review.

Administrative action, such as the fixing of rates, is presumptively valid, but not conclusively so. Since a law which seeks to make the decision of the legislature or of a commission conclusive as to the sufficiency or rates is unconstitutional,⁷⁵ a law which indirectly accomplishes a like result by imposing such conditions on the right to judicial relief as works an abandonment of the right rather than face the conditions on which it is offered or may be maintained, is also unconstitutional.⁷⁶

The same principle would apply to statutes or measures which, if enforced, would result in irreparable injury pending judicial review even though the statute itself should later be adjudged invalid. The right of judicial review, being a fundamental right by reason of the separation of powers stipulated in the Constitution, may not be rendered illusory by the statutory imposition, pending judicial review, of penalties so heavy that the party to be affected can appeal to the courts only at great risk. Statutes having that effect are unconstitu-

⁷¹ 28 USCA 71.

⁷² *Commissioners of Road Improvement Dist. No. 2 v. St. Louis Southwestern R. Co.* (1922) 257 U. S. 547, 66 L. Ed. 364, 42 S. Ct. 250.

⁷³ *Commissioners of Road Improvement Dist. No. 2 v. St. Louis Southwestern R. Co.* (1922) 257 U. S. 547, 66 L. Ed. 364, 42 S. Ct. 250.

⁷⁴ *Pacific Live Stock Co. v. Lewis* (1916) 241 U. S. 440, 60 L. Ed. 1084, 36 S. Ct. 637.

⁷⁵ *Chicago, M. & St. P. R. Co. v. Minnesota* (1890) 134 U. S. 418, 33 L. Ed. 970, 10 S. Ct. 462.

⁷⁶ *Missouri Pac. R. Co. v. Tucker* (1913) 230 U. S. 340, 57 L. Ed. 1507, 33 S. Ct. 961.

tional.⁷⁷ The right to judicial review is merely nominal and illusory if the party to be affected can appeal to the courts only at the risk of having to pay penalties so great that it is better to yield to orders of uncertain legality, rather than to ask for the protection of the law. Under the Constitution penalties cannot be collected if they operate

⁷⁷ *Natural Gas Pipeline Co. v. Slatery* (1937) 302 U. S. 300, 82 L. Ed. 276, 58 S. Ct. 199; *St. Louis-San Francisco R. Co. v. Alabama Public Service Commission* (1929) 279 U. S. 560, 73 L. Ed. 843, 49 S. Ct. 383; *St. Louis, I. M. & S. R. Co. v. Williams* (1919) 251 U. S. 63, 64 L. Ed. 139, 40 S. Ct. 71; *Wadley Southern R. Co. v. Georgia* (1915) 235 U. S. 651, 59 L. Ed. 405, 35 S. Ct. 214; *Missouri Pac. R. Co. v. Tucker* (1913) 230 U. S. 340, 57 L. Ed. 1507, 33 S. Ct. 961.

"So it appears that the only judicial review of an order fixing rates possible under the laws of the State was that arising in proceedings to punish for contempt. The constitution endows the Commission with the powers of a court to enforce its orders by such proceedings. (Article IX, §§ 18, 19.) By boldly violating an order a party against whom it was directed may provoke a complaint; and if the complaint results in a citation to show cause why he should not be punished for contempt, he may justify before the Commission by showing that the order violated was invalid, unjust or unreasonable. If he fails to satisfy the Commission that it erred in this respect, a judicial review is opened to him by way of appeal on the whole record to the Supreme Court. But the penalties, which may possibly be imposed, if he pursues this course without success, are such as might well deter even the boldest and most confident. The penalty for refusal to obey an order may be \$500; and each day's continuance of the refusal after service of the order it is declared 'shall be a separate offense.' The penalty may

apparently be imposed for each instance of violation of the order. In *Oklahoma Gin Co. v. Oklahoma*, decided this day, post, 339, it appears that the full penalty of \$500 with the provision for the like penalty for each subsequent day's violation of the order was imposed in each of three complaints there involved, although they were merely different instances of charges in excess of a single prescribed rate. Obviously a judicial review beset by such deterrents does not satisfy the constitutional requirements, even if otherwise adequate, and therefore the provisions of the acts relating to the enforcement of the rates by penalties are unconstitutional without regard to the question of the insufficiency of those rates." (Mr. Justice Brandeis in *Oklahoma Operating Co. v. Love* (1919) 252 U. S. 331, 336, 337, 64 L. Ed. 596, 40 S. Ct. 338.)

"A statute therefore which imposes heavy penalties for violation of commands of an unascertained quality, is in its nature, somewhat akin to an ex post facto law since it punishes for an act done when the legality of the command has not been authoritatively determined. Liability to a penalty for violation of such orders, before their validity has been determined, would put the party affected in a position where he himself must at his own risk pass upon the question. He must either obey what may finally be held to be a void order, or disobey what may ultimately be held to be a lawful order." (Mr. Justice Lamar in *Wadley Southern R. Co. v. Georgia* (1915) 235 U. S. 651, 662, 59 L. Ed. 405, 35 S. Ct. 214.)

to deter an interested party from testing the validity of administrative orders, legislative in their nature.⁷⁸ Even where a party improperly fails to exhaust administrative remedies, erroneously contending that it has no way of testing the constitutionality of the statute imposing penalties save by a premature suit, such failure does not justify exposing it, its officers and employees to the severe penalties prescribed by the statute, and the Supreme Court, while remanding the case, will continue a restraining order.⁷⁹

But this rule does not apply where the party affected has an opportunity to test the validity of the order before liability for penalties accrues. In such a case substantial penalties may be imposed for disobedience of the order if it is finally adjudged to be valid.⁸⁰

A statute making a party liable to a criminal prosecution pending judicial review would probably be invalid on similar principles. But there can be no arbitrary exposure to criminal prosecution for violation of an administrative order on the ground that the thing required, such as an estimate of cost, was impossible to prepare accurately, if criminal prosecution may be had only for knowing and wilful violations. Such penalties do not follow upon innocent mistakes.⁸¹

§ 50. Pending Legislative Review.

A state statute may not constitutionally prohibit a supersedeas or stay of enforcement of an administrative order pending the completion of legislative review.⁸² Such a course would, in an appropriate case, inevitably result in deprivation of a party's property without due process of law, and in a proper case a federal district court sitting in equity may stay enforcement of an administrative order pending legislative appeal or other completion of legislative review despite such a statute.⁸³

⁷⁸ *Wadley Southern R. Co. v. Georgia* (1915) 235 U. S. 651, 59 L. Ed. 405, 35 S. Ct. 214.

⁷⁹ *St. Louis-San Francisco R. Co. v. Alabama Public Service Commission* (1929) 279 U. S. 560, 73 L. Ed. 843, 49 S. Ct. 383.

⁸⁰ *St. Louis, I. M. & S. R. Co. v. Williams* (1919) 251 U. S. 63, 64 L. Ed. 139, 40 S. Ct. 71; *Gulf, C. & S. F. R. Co. v. Texas* (1918) 246 U. S. 58, 62 L. Ed. 574, 38 S. Ct. 236; *Wadley Southern R. Co. v. Georgia* (1915) 235 U. S. 651, 59 L. Ed. 405, 35 S. Ct. 214.

⁸¹ *American Telephone & Telegraph Co. v. United States* (1936) 299 U. S. 232, 81 L. Ed. 142, 57 S. Ct. 170; *California v. Latimer* (1938) 305 U. S. 255, 83 L. Ed. 159, 59 S. Ct. 166.

⁸² *Champlin Ref. Co. v. Corporation Commission* (1932) 286 U. S. 210, 76 L. Ed. 1062, 52 S. Ct. 559, 86 A. L. R. 403. See *Porter v. Investors Syndicate* (1932) 286 U. S. 461, 76 L. Ed. 1226, 52 S. Ct. 617.

⁸³ *Champlin Ref. Co. v. Corporation Commission* (1932) 286 U. S. 210, 76 L. Ed. 1062, 52 S. Ct. 559, 86 A. L. R. 403.

CHAPTER 2

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I. IN GENERAL

§ 51. General Function of Administrative Process Is to Complete the Legislative Process.

The administrative process consists of the exercise of functions committed to an administrative agency in the manner and to the extent provided by statute and required by the Constitution.

Administrative agencies which may affect private rights are charged with the enforcement of no policy except the policy of the law. Their duties are neither political nor executive, but predominantly quasi-judicial and quasi-legislative.¹ Their jurisdiction is quasi-judicial in applying a rule for the past, and quasi-legislative in prescribing a rule for the future.² The former is in its nature private and the latter public.³ The functions of such administrative agencies, are, however, essentially legislative in character.⁴ As administrative arms of the

¹ **National Labor Relations Board.** *Amalgamated Utility Workers v. Consolidated Edison Co.* (1940) 309 U. S. 261, 84 L. Ed. 738, 60 S. Ct. 561. *Postmaster-General.*

Degge v. Hitchcock (1913) 229 U. S. 162, 57 L. Ed. 1135, 33 S. Ct. 639. *The President.*

* *Humphrey v. United States* (1935) 295 U. S. 602, 79 L. Ed. 1611, 55 S. Ct. 869; *A. L. A. Schechter Poultry Corp. v. United States* (1935) 295 U. S. 495, 79 L. Ed. 1570, 55 S. Ct. 837, 97 A. L. R. 947.

² *Interstate Commerce Commission v. United States ex rel. Campbell* (1933) 289 U. S. 385, 77 L. Ed. 1273, 53 S. Ct. 607; *Arizona Grocery Co. v. Atchison, T. & S. F. R. Co.* (1932) 284 U. S. 370, 76 L. Ed. 348, 52 S.

Ct. 183; *Baer Bros. Mercantile Co. v. Denver & R. G. R. Co.* (1914) 233 U. S. 479, 58 L. Ed. 1055, 34 S. Ct. 641. See also §§ 70, 71.

³ *Baer Bros. Mercantile Co. v. Denver & R. G. R. Co.* (1914) 233 U. S. 479, 58 L. Ed. 1055, 34 S. Ct. 641.

⁴ See *Louisville & N. R. Co. v. Garrett* (1913) 231 U. S. 298, 58 L. Ed. 229, 34 S. Ct. 48.

"The nature of the final act determines the nature of the previous inquiry. As the judge is bound to declare the law he must know or discover the facts that establish the law. So when the final act is legislative the decision which induces it cannot be judicial in the practical sense, although the questions considered might be the same that would arise in the

legislature they complete a legislative process.⁵ Thus the Interstate Commerce Act is said to provide for a direct and indirect legislative fixing of rates.⁶ And the Federal Trade Commission is an administrative body created by Congress to carry into effect legislative policies embodied in the statute creating it in accordance with the legislative standards therein prescribed.⁷

§ 52. Administrative Process Contrasted with Judicial Process.

Administrative proceedings are of two kinds, adversary proceedings and proceedings which are not of an adversary character. The latter are of minor importance respecting private rights. Adversary administrative proceedings constitute the compelling innovation among classical methods of determining disputed questions which is principally responsible for the creation of principles of administrative law.

The judicial method of determining disputed questions places primary emphasis upon the decision of questions of law, with the determination of questions of fact regarded as perhaps of secondary importance. The administrative process, however, reverses the emphasis. It focuses its attention primarily upon the determination of administrative questions, that is, questions of fact, decisions of ques-

trial of a case. If a state constitution should provide for a hearing before any law should be passed, and should declare that it should be a judicial proceeding *in rem* and the decision binding upon all the world, it hardly is to be supposed that the simple device could make the constitutionality of the law *res judicata*, if it subsequently should be drawn in question before a court of the United States." (Mr. Justice Holmes in *Prentis v. Atlantic Coast Line Co.* (1908) 211 U. S. 210, 227, 53 L. Ed. 150, 29 S. Ct. 67.)

5 "In discussing the necessary content of findings of fact, it will be helpful to spell out the process which a commission properly follows in reaching a decision. The process necessarily includes at least four parts: (1) evidence must be taken and weighed, both as to its accuracy and

credibility; (2) from attentive consideration of this evidence a determination of facts of a basic or underlying nature must be reached; (3) from these basic facts the ultimate facts, usually in the language of the statute, are to be inferred, or not, as the case may be; (4) from this finding the decision will follow by the application of the statutory criterion." (Judge Stephens in *Saginaw Broadcasting Co. v. Federal Communications Commission* (1938) 68 App. D. C. 282, 96 F. (2d) 554, 559, cert. den. 305 U. S. 613, 83 L. Ed. 391, 59 S. Ct. 72.)

6 *Dayton-Goose Creek R. Co. v. United States* (1924) 263 U. S. 456, 68 L. Ed. 388, 44 S. Ct. 169, 33 A. L. R. 472.

7 *Humphrey v. United States* (1935) 295 U. S. 602, 79 L. Ed. 1611, 55 S. Ct. 869.

tions of law being frequently treated from the essentially practical standpoint of the agency, as incidental.⁸

Administrative agencies are called upon to make determinations of facts in the performance of their official duties, and to apply the law as they construe it to the facts so found. In so doing they do not exercise "judicial power," as that phrase is used in the Federal Constitution and laws.⁹

§ 53. General Rules for Validity of Administrative Schemes.

There is no constitutional necessity for providing a remedy in the courts for enforcement of a claim or right of action not embraced in the Judiciary Article of the Constitution.¹⁰ An administrative remedy may be provided for determination of any other claim or right of action, provided (1) that there is no improper delegation of legislative power to an agency,¹¹ (2) that proper standards of procedural due process are maintained in adversary administrative proceedings which are authorized or essential to a determination,¹² and (3) that full opportunity is provided for decision by an appropriate court, acting judicially, of every question of law involved in the controversy.¹³

⁸ A principal difference between enforcement of legal rights and liabilities in judicial and administrative proceedings is that in judicial proceedings the executive branch of the government acts last, after judgment has been entered and all questions of law settled. In administrative proceedings, exercising legislative fact-finding power, an agency acts first, free from judicial supervision, leaving questions of law to be settled later by the courts. See John Dickinson in "Administrative Justice and the Supremacy of Law," (1927) pp. 7-11.

⁹ Tracy v. Commissioner of Internal Revenue (C. C. A. 6th, 1931) 53 F. (2d) 575, cert. den. 287 U. S. 632, 77 L. Ed. 548, 53 S. Ct. 83.

¹⁰ Crowell v. Benson (1932) 285 U. S. 22, 76 L. Ed. 598, 52 S. Ct. 285.

¹¹ See § 8 et seq.

¹² See § 274 et seq.

¹³ See § 41 et seq.

Board of Review (Treasury Department).

* Anniston Mfg. Co. v. Davis (1937) 301 U. S. 337, 81 L. Ed. 1143, 57 S. Ct. 816.

National Labor Relations Board.

Myers v. Bethlehem Shipbuilding Corp. (1938) 303 U. S. 41, 82 L. Ed. 638, 58 S. Ct. 459; National Labor Relations Board v. Jones & Laughlin Steel Corp. (1937) 301 U. S. 1, 81 L. Ed. 893, 57 S. Ct. 615, 108 A. L. R. 1352.

The President.

A. L. A. Schechter Poultry Corp. v. United States (1935) 295 U. S. 495, 79 L. Ed. 1570, 55 S. Ct. 837, 97 A. L. R. 947.

State Agencies.

Southern R. Co. v. Virginia (1933) 290 U. S. 190, 78 L. Ed. 260, 54 S. Ct. 148.

Workmen's Compensation Cases.

Crowell v. Benson (1932) 285 U. S. 22, 76 L. Ed. 598, 52 S. Ct. 285.

§ 54. — To Determine Claims Against the United States.

Where the United States creates claims against itself, it is not bound to provide a remedy in the courts, for claimants have no legal rights apart from those created *ex gratia*. It may withhold all remedy or it may provide an administrative remedy and make it exclusive, however erroneous under judicial standards application of the administrative remedy may be in a particular case.¹⁴ This means that so far as claims against the United States are concerned, the administrative remedy may be made exclusive to the extent of precluding judicial review on questions of law.¹⁵ Judicial review may be precluded by Act of Congress in this instance because no case or controversy may be established for application of the judicial power, due to the absence of legal rights against the United States beyond those expressly created by statute.

However the desirability of judicial review is so fundamental, so inherent in our concept of the fair settlement of any claim or controverted matter, that its restriction, even where constitutionally possible, will never be presumed or expected in the absence of a plain command. Thus even with respect to claims against the United States the right to judicial review upon questions of law will not, in the absence of a plain statutory command, be deemed to be denied or restricted, and in the absence of any such plain statutory command, all questions of law are open for independent judicial decision.¹⁶ For instance, the judicial limitations upon the doctrine of administrative finality apply in determining claims against the United States in the absence of a plain statutory command precluding judicial review.¹⁷

The orthodox requirement that administrative remedies be exhausted controls with special force respecting claims against the United States.¹⁸

§ 55. — State Administrative Schemes.

Federal questions affecting the validity of a state administrative scheme include questions as to procedural due process in adminis-

¹⁴ *Dismuke v. United States* (1936) 297 U. S. 167, 80 L. Ed. 561, 56 S. Ct. 400, rehearing denied 297 U. S. 728, 80 L. Ed. 1011, 56 S. Ct. 594.

¹⁵ See *Dismuke v. United States* (1936) 297 U. S. 167, 80 L. Ed. 561, 56 S. Ct. 400, rehearing denied 297 U. S. 728, 80 L. Ed. 1011, 56 S. Ct. 594.

¹⁶ *Dismuke v. United States* (1936)

297 U. S. 167, 80 L. Ed. 561, 56 S. Ct. 400, rehearing denied 297 U. S. 728, 80 L. Ed. 1011, 56 S. Ct. 594.

¹⁷ *Dismuke v. United States* (1936) 297 U. S. 167, 80 L. Ed. 561, 56 S. Ct. 400, rehearing denied 297 U. S. 728, 80 L. Ed. 1011, 56 S. Ct. 594.

¹⁸ *United States v. Felt & Tarrant Co.* (1931) 283 U. S. 269, 75 L. Ed. 1025, 51 S. Ct. 376.

trative proceedings,¹⁹ whether a state statute violates the Fourteenth Amendment by purporting to confer arbitrary discretion upon an administrative agency,²⁰ or by failure to provide for the independent judgment of a court as to law and facts when confiscation or other constitutional questions are in issue.²¹

The construction by an appropriate state court of a state statute setting up an administrative scheme and the necessary implications of that construction are binding upon the federal courts.²²

§ 56. Five Functions Exercisable in the Administrative Process.

There are five functions or powers exercised in the administrative process: (1) the power to investigate;²³ (2) the power to make rules and regulations to amplify the statute under which an agency acts, that is, administrative legislation;²⁴ (3) the power to determine administrative questions, which are within the legislative sphere, and are ordinarily matters of fact, that is, administrative determination;²⁵ (4) the function of venturing a decision, which is not binding, upon a question of law or judicial question;²⁶ and (5) the power to apply the legislative mandate set out in the statute, the exercise of which power takes the form of an administrative sanction.²⁷

Each of these powers or functions may be exercised by an administrative agency only upon statutory authorization, express or implied. As the creature of statute an agency is limited thereby as well as by the Constitution.

II. ADMINISTRATIVE INVESTIGATION

§ 57. In General.

Congress has the power, by investigation to gather all information bearing upon activities which are within the range of congressional power, as an aid to appropriate legislation, and such information may be obtained through the continuous supervision of an administrative

¹⁹ See § 274 et seq.

²⁰ *Yick Wo v. Hopkins* (1886) 118 U. S. 356, 30 L. Ed. 220, 6 S. Ct. 1064. See also *Douglas v. Noble* (1923) 261 U. S. 165, 67 L. Ed. 590, 43 S. Ct. 303.

²¹ *Ohio Valley Water Co. v. Ben Avon Borough* (1920) 253 U. S. 287, 64 L. Ed. 908, 40 S. Ct. 527.

²² *Farncomb v. Denver* (1920) 252

U. S. 7, 64 L. Ed. 424, 40 S. Ct. 271; *Pacific Live Stock Co. v. Lewis* (1916) 241 U. S. 440, 60 L. Ed. 1084, 36 S. Ct. 637.

²³ See § 57.

²⁴ See §§ 64, 489 et seq.

²⁵ See § 66 et seq.

²⁶ See §§ 41, 423 et seq.

²⁷ See § 260.

agency under appropriate authorization by Congress.²⁸ Thus statutes frequently confer investigatory powers upon administrative agencies.²⁹ Perhaps the most striking characteristic of administrative agencies is their investiture with power far exceeding and different from that of courts, such as the power of investigation. Thus they may themselves initiate inquiry, or when their authority is invoked they may control the range of investigation in ascertaining the public interest of great regions or the whole country. They are free to make their own rules of procedure.³⁰

As the requirement of information is in itself a permissible and useful type of regulation, the only judicial question involved is whether a particular demand for information can be validly addressed to the party in question, and if so, whether it exceeds constitutional or statutory limits because of the character and extent of the information sought.³¹

Whether a particular attempt to get information is lawful is ordinarily a question of statutory construction.³² Thus, where a

²⁸ *Electric Bond & Share Co. v. Securities & Exchange Commission* (1938) 303 U. S. 419, 82 L. Ed. 936, 58 S. Ct. 678, 115 A. L. R. 105; *Smith v. Interstate Commerce Commission* (1917) 245 U. S. 33, 62 L. Ed. 135, 38 S. Ct. 30; *Interstate Commerce Commission v. Baird* (1904) 194 U. S. 25, 48 L. Ed. 860, 24 S. Ct. 563. See *United States v. Los Angeles & S. L. R. Co.* (1927) 273 U. S. 299, 71 L. Ed. 651, 47 S. Ct. 413.

²⁹ *Administrator of the Wage and Hour Division.*

29 USCA 211.

Federal Power Commission.

16 USCA 797 (a), 825f, 825j.

Federal Trade Commission.

15 USCA 46.

Interstate Commerce Commission.

49 USCA 12 (1).

National Labor Relations Board.

29 USCA 161.

Secretary of Agriculture.

7 USCA 12.

Securities and Exchange Commission.

15 USCA 77s, 77uuu (a), 78u, 79m.

United States Maritime Commission.

46 USCA 1122 (e).

³⁰ *Federal Communications Commission v. Pottsville Broadcasting Co.* (1940) 309 U. S. 134, 84 L. Ed. 656, 60 S. Ct. 437.

³¹ *Federal Trade Commission.*

* *Federal Trade Commission v. American Tobacco Co.* (1924) 264 U. S. 298, 68 L. Ed. 696, 44 S. Ct. 336. *Interstate Commerce Commission.*

* *United States v. Louisville & N. R. Co.* (1915) 236 U. S. 318, 59 L. Ed. 598, 35 S. Ct. 363; *Harriman v. Interstate Commerce Commission* (1908) 211 U. S. 407, 53 L. Ed. 253, 29 S. Ct. 115; *United States v. Clyde S. S. Co.* (C. C. A. 2d, 1929) 36 F. (2d) 691.

Securities and Exchange Commission.

Electric Bond & Share Co. v. Securities & Exchange Commission (1938) 303 U. S. 419, 82 L. Ed. 936, 58 S. Ct. 678, 115 A. L. R. 105.

³² *Federal Trade Commission v. American Tobacco Co.* (1924) 264 U. S. 298, 68 L. Ed. 696, 44 S. Ct. 336; *United States v. Louisville & N. R. Co.* (1915) 236 U. S. 318, 59 L. Ed. 598, 35 S. Ct. 363; *Cudahy Packing Co. v. United States* (C. C. A. 7th, 1926) 15 F. (2d) 133.

statute provides access to documentary evidence, it has been interpreted as giving access, not to all documents, but to such documents as are evidence, and the fact that some part of a large mass of papers may contain relevant evidence will not warrant a demand for the whole.³³ However, it has been held that a demand for papers is not too broad, though in general terms seeking for records relating to all shipments, where it embraced many papers which the Interstate Commerce Commission had the right to examine, and these could have been submitted while the others were withheld.³⁴ Investigations by administrative agencies, are analogous to those conducted by grand juries, and should not be too strictly limited. If the agency is in possession of facts affording grounds for a reasonable belief that a violation of the statute which it is its duty to enforce, has occurred or is threatened, it may order an investigation.³⁵ As the purpose of the Securities Act is to require complete and truthful exposure of all matters in relation to a registrant's financial condition it has been held that the Securities and Exchange Commission may inquire into the affairs of a company controlled by a registrant.³⁶ An order requiring disclosure of a "copy" or "summary" of books and records has been held not to constitute an unreasonable search and seizure, forbidden by the Fourth Amendment, because it "does not call for the production or inspection of any of appellant's books or papers."³⁷ The giving of false testimony which has a natural tendency to influence the fact-finding agency in its investigation is punishable as perjury, even where the testimony was given at a private hearing in the nature of an *ex parte* investigatory proceeding, and before an examiner appointed by the agency, and exercising powers delegated to him.³⁸

But an official inquisition to compel disclosures of fact is not an end but a means to an end; and it is a mere truism to say that the end must be a legitimate one to justify the means. No legitimate pur-

³³ Federal Trade Commission v. American Tobacco Co. (1924) 264 U. S. 298, 68 L. Ed. 696, 44 S. Ct. 336. (D. C. W. D. Pa. 1936) 13 F. Supp. 286.

³⁴ United States v. Clyde S. S. Co. (C. C. A. 2d, 1929) 36 F. (2d) 691.

³⁵ Consolidated Mines of California v. Securities & Exchange Commission (C. C. A. 9th, 1938) 97 F. (2d) 704. See also Securities & Exchange Commission v. Tung Corp. (D. C. N. D. Ill., E. Div., 1940) 32 F. Supp. 371; United States v. Union Trust Co.

³⁶ Bank of America Nat. Trust & Savings Ass'n v. Douglas (1939) 70 App. D. C. 221, 105 F. (2d) 100, 123 A. L. R. 1266 (SEC).

³⁷ Isbrandtsen-Moller Co., Inc. v. United States (1937) 300 U. S. 139, 81 L. Ed. 562, 57 S. Ct. 407.

³⁸ Woolley v. United States (C. C. A. 9th, 1938) 97 F. (2d) 258.

pose being specified, further pursuit of the inquiry would become a fishing expedition for the chance that something discreditable might turn up, an undertaking which has uniformly met with judicial condemnation. A general, roving, offensive, inquisitorial, compulsory investigation, conducted by a commission without any allegations, upon no fixed principles, and governed by no rules of law, or of evidence, and no restrictions except its own will or caprice, is unknown to our Constitution and laws. An investigation not based upon specific grounds is quite as objectionable as a search warrant not based upon specific statements of fact. It cannot be made lawful by what it actually succeeds in bringing to light.³⁹

The Federal Power Commission may make an investigation to ascertain the original cost and net investment of any licensee at any time, as an administrative matter, and its investigation is not limited to that necessary for a judicial determination at the end of the license period.⁴⁰

³⁹ *Jones v. Securities & Exchange Commission* (1936) 298 U. S. 1, 80 L. Ed. 1015, 56 S. Ct. 654. See *Cudahy Packing Co. v. United States* (C. C. A. 7th, 1926) 15 F. (2d) 133 (Secy. of Agriculture).

"Nothing appears in any of the proceedings taken by the commission to warrant the suggestion that the investigation was undertaken or would be carried on for any other purpose or to any different end than that specifically named. An official inquisition to compel disclosures of fact is not an end, but a means to an end; and it is a mere truism to say that the end must be a legitimate one to justify the means. The citizen, when interrogated about his private affairs, has a right before answering to know why the inquiry is made; and if the purpose disclosed is not a legitimate one, he may not be compelled to answer. Since here the only disclosed purpose for which the investigation was undertaken had ceased to be legitimate when the registrant rightfully withdrew his statement, the power of the commission to proceed

with the inquiry necessarily came to an end. Dissociated from the only ground upon which the inquiry had been based, and no other being specified, further pursuit of the inquiry, obviously, would become what Mr. Justice Holmes characterized as 'a fishing expedition * * * for the chance that something discreditable might turn up' (*Ellis v. Interstate Commerce Comm.*, 237 U. S. 434, 445) —an undertaking which uniformly has met with judicial condemnation. In *re Pacific Ry. Comm.*, 32 Fed. 241, 250; *Kilbourn v. Thompson*, 103 U. S. 168, 190, 192, 193, 195, 196; *Boyd v. United States*, 116 U. S. 616; *Harriman v. Interstate Commerce Comm.*, 211 U. S. 407, 419; *Federal Trade Comm. v. American Tobacco Co.*, 264 U. S. 298, 305-307." (Mr. Justice Sutherland in *Jones v. Securities & Exchange Commission* (1936) 298 U. S. 1, 25, 26, 80 L. Ed. 1015, 56 S. Ct. 654.)

⁴⁰ *Clarion River Power Co. v. Smith* (1932) 61 App. D. C. 186, 59 F. (2d) 861, cert. den. 287 U. S. 639, 77 L. Ed. 553, 53 S. Ct. 88.

A statute may not give an agency power to inspect privileged communications, such as those between counsel and client.⁴¹ A senatorial resolution cannot enlarge an agency's statutory powers of investigation.⁴² Under a joint resolution, however, authorizing the Federal Trade Commission to investigate financial and economic conditions of agricultural producers engaged in interstate commerce with a view to legislation to prevent evasion of the income tax and the burdening of interstate and foreign commerce, inquiries not clearly unrelated to interstate commerce and related to intrastate commerce are held to be within the Commission's powers, although requiring information not related to those breaches of law which it is the Commission's statutory duty to investigate.⁴³ A subpoena of the Board of Tax Appeals requiring the Commissioner of Internal Revenue to furnish information contained in tax returns is valid and enforceable, if it calls for information relevant to the issues before the Board.⁴⁴

§ 58. — State Cases.

An order requiring a party to file information with a state administrative agency will be upheld in the Supreme Court where the order is valid under state law and does not burden, obstruct, or unduly interfere with the free flow of interstate commerce,⁴⁵ or otherwise contravene the Constitution. An order requiring that information be furnished cannot burden, obstruct, or unduly interfere with interstate commerce where probable usefulness of the information sought respecting local activities is established, even though the party affected is exclusively engaged in interstate commerce.⁴⁶ The investigatory powers of state administrative agencies are broad in scope and the fact that a projected investigation will require con-

⁴¹ *United States v. Louisville & N. R. Co.* (1915) 236 U. S. 318, 59 L. Ed. 598, 35 S. Ct. 363.

⁴² *United States v. Louisville & N. R. Co.* (1915) 236 U. S. 318, 59 L. Ed. 598, 35 S. Ct. 363.

⁴³ *Federal Trade Commission v. National Biscuit Co.* (D. C. S. D. N. Y. 1937) 18 F. Supp. 667.

⁴⁴ *Blair v. Oesterlein Machine Co.* (1927) 275 U. S. 220, 72 L. Ed. 249,

48 S. Ct. 87.

⁴⁵ *Arkansas Louisiana Gas Co. v. Department of Public Utilities* (1938) 304 U. S. 61, 82 L. Ed. 1149, 58 S. Ct. 770.

⁴⁶ *Arkansas Louisiana Gas Co. v. Department of Public Utilities* (1938) 304 U. S. 61, 82 L. Ed. 1149, 58 S. Ct. 770; *Natural Gas Pipeline Co. v. Slattery* (1937) 302 U. S. 300, 82 L. Ed. 276, 58 S. Ct. 199.

siderable expenses by a utility company does not alone warrant interference with the investigation by injunction in a federal court.⁴⁷

§ 59. The Subpoena Power.

The congressional power of investigation includes the power to compel testimony as a means to that end. This involves the power to issue subpoenae and punish for contempt. The power to subpoena may be delegated to an agency, and the federal courts made available to enforce the power. This, like other administrative proceedings in federal courts, may present a "case" or "controversy" within section 2 of Article III of the Constitution.⁴⁸ And although the United States be a party, it is a direct civil action, expressly authorized by Congress.⁴⁹

Statutes, such as the Federal Trade Commission Act, frequently delegate power to require by subpoena, enforceable in court, in a proper case, the attendance and testimony of witnesses and the production of documentary evidence relating to any matter under investigation from any place in the United States to any designated place of hearing.⁵⁰

§ 60. Other Methods of Enforcement.

Other statutory measures for enforcing the administrative power of investigation are those providing for mandamus or forfeiture in connection therewith. Where the Interstate Commerce Commission applies for a writ of mandamus to compel the disclosure of information, it is not estopped from claiming forfeitures for failure to furnish the information.⁵¹

Federal District Courts have jurisdiction to entertain suits for mandamus to compel compliance by private parties with a demand, made by the Secretary of Agriculture under the Packers and Stockyards Act, for access to their records.⁵²

⁴⁷ *Interstate Natural Gas Co. v. Louisiana Public Service Commission* (D. C. E. D. La., Baton Rouge Div., 1940) 33 F. Supp. 50.

⁴⁸ *McCrone v. United States* (1939) 307 U. S. 61, 83 L. Ed. 1108, 59 S. Ct. 685. See *Federal Trade Commission v. Millers' National Federation* (1931) 60 App. D. C. 66, 47 F. (2d) 428.

⁴⁹ *McCrone v. United States* (1939) 307 U. S. 61, 83 L. Ed. 1108, 59 S. Ct. 685.

⁵⁰ *Federal Trade Commission v. Klesner* (1927) 274 U. S. 145, 71 L. Ed. 972, 47 S. Ct. 557; *Robertson v. Railroad Labor Board* (1925) 268 U. S. 619, 69 L. Ed. 1119, 45 S. Ct. 621; *Brownson v. United States* (C. C. A. 8th, 1929) 32 F. (2d) 844.

⁵¹ *United States v. Clyde S. S. Co.* (C. C. A. 2d, 1929) 36 F. (2d) 691.

⁵² *Cudahy Packing Co. v. United States* (C. C. A. 7th, 1926) 15 F. (2d) 133.

§ 61. Forms of Account and Reports.

Administrative investigatory powers include power to require a system of accounting designed to prevent the possible concealment of forbidden practices.⁵³ This power may extend to the prescription of forms of account for the intrastate business of a company within its jurisdiction.⁵⁴ Analogous to the power to require a uniform system of accounts, and resting on the same base is the power to require periodical reports on other matters, such as employees' hours of labor, or injuries.⁵⁵

No hearing need be held before issuing an order requiring the making of such reports, and where they concern a business affected with a public interest the provisions of the Fourth Amendment do not apply.⁵⁶

§ 62. Valuation.

An agency may be granted the power to make valuations, which, while not reviewable orders themselves, may become a basis for action by the agency, by Congress, or by the legislature or an administrative board of a state. This is an exercise of the function of investigation.⁵⁷

§ 63. Referenda.

An agency may be granted the power to gather information by holding referenda,⁵⁸ and making them the basis of its determinations.⁵⁹ The legislature may authorize a very broad exercise of dis-

⁵³ Interstate Commerce Commission v. Goodrich Transit Co. (1912) 224 U. S. 194, 56 L. Ed. 729, 32 S. Ct. 436. See also Alton & S. R. Co. v. United States (D. C. Cal. 1931) 49 F. (2d) 414; Cudahy Packing Co. v. United States (C. C. A. 7th, 1926) 15 F. (2d) 133; American Telephone & Telegraph Co. v. United States (1936) 14 F. Supp. 121, aff'd 299 U. S. 232, 81 L. Ed. 142, 57 S. Ct. 170.

⁵⁴ Interstate Commerce Commission v. Goodrich Transit Co. (1912) 224 U. S. 194, 56 L. Ed. 729, 32 S. Ct. 436.

⁵⁵ Baltimore & O. R. Co. v. Interstate Commerce Commission (1911) 221 U. S. 612, 55 L. Ed. 878, 31 S. Ct.

621; Bartlett Frazier Co. v. Hyde (C. C. A. 7th, 1933) 65 F. (2d) 350, cert. den. 290 U. S. 654, 78 L. Ed. 567, 54 S. Ct. 70.

⁵⁶ Bartlett Frazier Co. v. Hyde (C. C. A. 7th, 1933) 65 F. (2d) 350, cert. den. 290 U. S. 654, 78 L. Ed. 567, 54 S. Ct. 70.

⁵⁷ United States v. Los Angeles & S. L. R. Co. (1927) 273 U. S. 299, 71 L. Ed. 651, 47 S. Ct. 413.

⁵⁸ See the Agricultural Marketing Agreement Act of 1937, 7 USCA 601 et seq.

⁵⁹ H. P. Hood & Sons v. United States (1939) 307 U. S. 588, 83 L. Ed. 1478, 59 S. Ct. 1019.

cretion in this field; thus an agency may institute and change the rules of the election including those determining eligibility to vote.⁶⁰

III. ADMINISTRATIVE LEGISLATION: POWER TO MAKE RULES AND REGULATIONS

§ 64. Administrative Regulations.

To an administrative agency may be delegated the power to make rules and regulations to carry into effect the will of Congress expressed in a statute, that is "power to fill up the details."⁶¹ As a practical matter this is, purely and simply, delegated power to make, within limits, "little laws." Administrative legislation thus provides perhaps the most extensive legitimate opportunity for an agency to express legislative "policy."⁶²

From the standpoint of private rights administrative legislation may only be brought into litigation when a judicial case or controversy arises depending upon the question of its legal validity.⁶³ The legal requirements for administrative legislation are set forth in the section on judicial review.⁶⁴

§ 65. Administrative Rules.

Administrative agencies frequently exercise the power to make rules of practice for their own proceedings. Analogy between administrative rules and Senate rules is obvious. Accordingly the principle, applicable to the latter, that rules of the Senate may not ignore constitutional restraints or violate fundamental rights and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained,⁶⁵ should govern both.

IV. ADMINISTRATIVE DETERMINATION: POWER TO DETERMINE QUESTIONS OF FACT

§ 66. Introduction.

Certain determinations of fact do not require judicial determination, and the mode of their determination, being completely within

⁶⁰ Nashville, C. & St. L. Ry. v. Railway Employees' Dept. of A. F. of L. (C. C. A. 6th, 1937) 93 F. (2d) 340, cert. den. 303 U. S. 649, 82 L. Ed. 1110, 58 S. Ct. 746.

⁶¹ See §§ 8, 489 et seq.

⁶² For a discussion of the advantages and disadvantages of administrative legislation, see Blachly and

Oatman in "Administrative Legislation and Adjudication," (1934) p. 43 et seq.

⁶³ See § 187 et seq.

⁶⁴ See § 489 et seq.

⁶⁵ United States v. Smith (1932) 286 U. S. 6, 76 L. Ed. 954, 52 S. Ct. 475.

the control of Congress, may be delegated to an administrative agency.⁶⁶ Familiar illustrations of administrative agencies created for the determination of such matters are found in connection with the exercise of the congressional power as to interstate and foreign commerce, taxation, immigration, the public lands, public health, the facilities of the post office, pensions, workmen's compensation, and payments to veterans.⁶⁷ These matters are legislative, and are ordinarily described in this work as administrative questions.⁶⁸ Determinations of administrative questions constitute the great bulk of the real work of administrative agencies, affording administrative disciplinary action for violations of statutes.⁶⁹ These questions must be sharply distinguished from judicial and constitutional questions, to which entirely different rules apply.⁷⁰

§ 67. Adversary, Quasi-Judicial Proceedings Necessary to Determine Administrative Questions.

Administrative questions which affect private rights may obviously not be determined *ex parte* or arbitrarily under the Constitution. On the contrary, such questions may only be determined by evidence and argument adduced in adversary proceedings inherently quasi-judicial in nature.⁷¹

§ 68. Determination of Administrative Questions: Legislative Discretion.

Based upon the evidence adduced in adversary proceedings conducted before it, an agency may find that the legislative standard or rule of conduct applies to the particular facts, such findings becoming the jurisdictional springboard for application of the legislative mandate or prohibition.⁷² To make such findings from the

⁶⁶ See § 5.

⁶⁷ *Crowell v. Benson* (1932) 285 U. S. 22, 76 L. Ed. 598, 52 S. Ct. 285.

For an instance of an administrative agency that became a legislative court (the Court of Claims), see *Williams v. United States* (1933) 289 U. S. 553, 77 L. Ed. 1372, 53 S. Ct. 751; *United States v. Gilliat* (1896) 164 U. S. 42, 41 L. Ed. 344, 17 S. Ct. 16.

⁶⁸ See § 505 et seq.

⁶⁹ For the practice in the institution of formal administrative disciplinary action for violations of statutes or regulations, see the Final Report of the Attorney General's Committee on Administrative Procedure (1941) p. 286 et seq.

⁷⁰ See §§ 261, 423 et seq.

⁷¹ See § 276.

⁷² See § 437, 550, et seq.

evidence an administrative agency exercises a discretion which is legislative in character. The discretion delegated is essentially a legislative discretion, and the agency to whom the discretion is delegated is administrative only in the sense that it is there to administer, by use of that discretion in particular cases, a factual standard set up by the legislature.⁷³ It completes the legislative process with the same effect as if the legislature had enacted a law with detailed classifications directly applicable to many different parties.⁷⁴

Exercise of discretion, however, is not the equivalent of expression of a whim or caprice. On the contrary its exercise must be controlled by reason and the application of legal principles.⁷⁵

This legislative discretion is unaffected by the fact that the previous administrative proceedings were quasi-judicial in character⁷⁶ and the fact that the determination itself, when subsequently made, may be quasi-judicial,⁷⁷ and it extends to the entire legislative process of fact-finding, including the method used in reaching legislative determinations of fact.⁷⁸ This legislative discretion is not judicially controllable as a matter of constitutional right, and the determination

⁷³ *Humphrey v. United States* (1935) 295 U. S. 602, 79 L. Ed. 1611, 55 S. Ct. 869; *Myles Salt Co. v. Board of Com'rs of Iberia & St. Mary Drainage Dist.* (1916) 239 U. S. 478, 60 L. Ed. 392, 36 S. Ct. 204; *Louisville & N. R. Co. v. Garrett* (1913) 231 U. S. 298, 58 L. Ed. 229, 34 S. Ct. 48. See *Gulf, C. & S. F. R. Co. v. Texas* (1918) 246 U. S. 58, 62 L. Ed. 574, 38 S. Ct. 236.

⁷⁴ See *Arizona Grocery Co. v. Atchison, T. & S. F. R. Co.* (1932) 284 U. S. 370, 76 L. Ed. 348, 52 S. Ct. 183; *Pitney, J., dissenting in Mitchell Coal & Coke Co. v. Pennsylvania R. Co.* (1913) 230 U. S. 247, 57 L. Ed. 1472, 33 S. Ct. 916.

⁷⁵ "When anything is left to any person to be done according to his discretion, the law intends it must be done with sound discretion, and according to law: and the Court of King's Bench hath a power to redress things that are otherwise done, not-

withstanding they are left to the discretion of those that do them. 1 Lil. Abr. 477.

"Discretion is to discern between right and wrong; and therefore whoever hath power to act at discretion, is bound by the rule of reason and law. 2 Inst. 56, 298.

"And though there be a latitude of discretion given to one, yet he is circumscribed, that what he does be necessary and convenient; without which no liberty can defend it. Hob. 158." Jacob (Tomlins) Law Dictionary (2nd Ed.) London 1809, "Discretion."

See *Jones v. Securities & Exchange Commission* (1936) 298 U. S. 1, 80 L. Ed. 1015, 56 S. Ct. 654.

⁷⁶ See § 276.

⁷⁷ See § 70.

⁷⁸ See *Louisville & N. R. Co. v. Garrett* (1913) 231 U. S. 298, 58 L. Ed. 229, 34 S. Ct. 48. See also § 505 et seq.

made is conclusive if resulting findings are supported by substantial evidence.⁷⁹

§ 69. — Previous Determination Not Res Judicata.

Administrative authority is in its nature continuing.⁸⁰ It is not exhausted or terminated by its execution on one occasion. Under it an agency can reconsider its determination, and revoke it if it is found wrong,⁸¹ and, where the agency is an individual, so may his successor.⁸² Administrative determinations are evidential of the rights concerned, but there is no basis for holding them conclusive or not subject to revision.⁸³

§ 70. Quasi-Judicial Determinations.

Administrative findings or determinations may be of two kinds, quasi-judicial and quasi-legislative. The application of these terms to administrative findings must be sharply distinguished from their application to administrative proceedings of an adversary character which are themselves of a quasi-judicial nature.⁸⁴

A quasi-judicial administrative determination is a finding or determination to the effect that the legislative standard, policy, or rule of conduct applies to certain past transactions.⁸⁵ Such determina-

⁷⁹ Consolidated Edison Co. v. National Labor Relations Board (1938) 305 U. S. 197, 83 L. Ed. 126, 59 S. Ct. 206. See also §§ 515, 575 et seq.

⁸⁰ Wilbur v. United States ex rel. Kadrie (1930) 281 U. S. 206, 74 L. Ed. 809, 50 S. Ct. 320.

⁸¹ See §§ 183, 255 et seq.

⁸² Wilbur v. United States ex rel. Kadrie (1930) 281 U. S. 206, 74 L. Ed. 809, 50 S. Ct. 320.

⁸³ Wilbur v. United States ex rel. Kadrie (1930) 281 U. S. 206, 74 L. Ed. 809, 50 S. Ct. 320.

⁸⁴ See § 276.

⁸⁵ Federal Trade Commission.

Humphrey v. United States (1935) 295 U. S. 602, 79 L. Ed. 1611, 55 S. Ct. 869.

Interstate Commerce Commission.

Atchison, T. & S. F. R. Co. v. United States (1935) 295 U. S. 193, 79

L. Ed. 1382, 55 S. Ct. 748; Interstate Commerce Commission v. United States ex rel. Campbell (1933) 289 U. S. 385, 77 L. Ed. 1273, 53 S. Ct. 607; Great Northern R. Co. v. Merchants Elevator Co. (1922) 259 U. S. 285, 66 L. Ed. 943, 42 S. Ct. 477; Baer Bros. Mercantile Co. v. Denver & R. G. R. Co. (1914) 233 U. S. 479, 58 L. Ed. 1055, 34 S. Ct. 641.

National Labor Relations Board.

Amalgamated Utility Workers v. Consolidated Edison Co. (1940) 309 U. S. 261, 84 L. Ed. 738, 60 S. Ct. 561.

State Agencies.

Commissioners of Road Improvement Dist. No. 2 v. St. Louis Southwestern R. Co. (1922) 257 U. S. 547, 66 L. Ed. 364, 42 S. Ct. 250.

Quotations.

"The distinction between a judicial and legislative act is well de-

tions may constitutionally also be made in appropriate judicial proceeding,⁸⁶ and quasi-judicial administrative determinations may, by act of Congress, be transferred to judicial tribunals for examination and determination *de novo*.⁸⁷ But the determinations of agencies, although made in a quasi-judicial capacity, are not an exercise of judicial functions. Not being judgments, these determinations are, in the absence of statute, not subject to appeal (in the strict sense), writ of error, or certiorari.⁸⁸

The Interstate Commerce Act altered the common law by lodging in the Commission the power theretofore exercised in judicial proceedings, of determining the reasonableness of a published rate.⁸⁹ If the finding on this question is against the carrier reparation is awarded the shipper although suit for damages by enforcement of the award is relegated to the courts. In passing upon the issue of fact, as to the past reasonableness of rates, the function of the Commission is judicial in character, and its action is termed quasi-judicial,⁹⁰ and is the determination of a matter essentially private.⁹¹

finer. The one determines what the law is, and what the rights of parties are, with reference to transactions already had; the other prescribes what the law shall be in future cases arising under it. Wherever an act undertakes to determine a question of right or obligation, or of property, as the foundation upon which it proceeds, such act is to that extent a judicial one, and not the proper exercise of legislative functions." (Mr. Justice Field dissenting in *The Sinking Fund Cases* (1879) 9 Otto (99 U. S.) 700, 761, 25 L. Ed. 496.)

⁸⁶ *Arizona Grocery Co. v. Atchison, T. & S. F. R. Co.* (1932) 284 U. S. 370, 76 L. Ed. 348, 52 S. Ct. 183. See *The Assigned Car Cases* (1927) 274 U. S. 564, 71 L. Ed. 1204, 47 S. Ct. 727. See also § 5.

⁸⁷ *Stephens v. Cherokee Nation* (1899) 174 U. S. 445, 43 L. Ed. 1041, 19 S. Ct. 722; *United States ex rel. Bernardin v. Duell* (1899) 172 U. S. 576, 43 L. Ed. 559, 19 S. Ct. 286.

⁸⁸ *Degge v. Hitchcock* (1913) 229 U. S. 162, 57 L. Ed. 1135, 33 S. Ct. 639.

⁸⁹ *Arizona Grocery Co. v. Atchison, T. & S. F. R. Co.* (1932) 284 U. S. 370, 76 L. Ed. 348, 52 S. Ct. 183. See *Baer Bros. Mercantile Co. v. Denver & R. G. R. Co.* (1914) 233 U. S. 479, 58 L. Ed. 1055, 34 S. Ct. 641.

⁹⁰ *Arizona Grocery Co. v. Atchison, T. & S. F. R. Co.* (1932) 284 U. S. 370, 76 L. Ed. 348, 52 S. Ct. 183; *Baer Bros. Mercantile Co. v. Denver & R. G. R. Co.* (1914) 233 U. S. 479, 58 L. Ed. 1055, 34 S. Ct. 641.

"The Act altered the common law by lodging in the Commission the power theretofore exercised by courts, of determining the reasonableness of a published rate. If the finding on this question was against the carrier, reparation was to be awarded the shipper, and only the enforcement of the award was relegated to the courts. In passing upon the issue of fact the function of the Commission was judicial in character; its action affected only the past, so far as any remedy of the shipper was concerned, and adjudged for the present merely that the rate was then unreasonable; no

§ 71. Quasi-Legislative Determinations.

The characteristic of legislation is the making of a new rule to be applied in the future rather than application of an already existent rule to past facts, which is a judicial function. Thus a quasi-legislative determination is a determination that a legislative standard, policy or rule of conduct applies to certain future transactions.⁹²

authority was granted to prescribe rates to be charged in the future. Indeed, after a finding that an existing rate was unreasonable, the carrier might put into effect a new and slightly different rate and compel the shipper to resort to a new proceeding to have this declared unreasonable. Since the carrier had complete liberty of action in making the rate, it necessarily followed that upon a finding of unreasonableness, an award of reparation should be measured by the excess paid, subject only to statutory limitations of time." (Mr. Justice Roberts in *Arizona Grocery Co. v. Atchison, T. & S. F. R. Co.* (1932) 284 U. S. 370, 384, 385, 76 L. Ed. 348, 52 S. Ct. 183.)

⁹¹ *Baer Bros. Mercantile Co. v. Denver & R. G. R. Co.* (1914) 233 U. S. 479, 58 L. Ed. 1055, 34 S. Ct. 641.

⁹² **Federal Communications Commission.**

* *American Telephone & Telegraph Co. v. United States* (1936) 14 F. Supp. 121, aff'd 299 U. S. 232, 81 L. Ed. 142, 57 S. Ct. 170.

Federal Trade Commission.

Humphrey v. United States (1935) 295 U. S. 602, 79 L. Ed. 1611, 55 S. Ct. 869.

Interstate Commerce Commission.

Atlantic Coast Line R. Co. v. Florida (1935) 295 U. S. 301, 79 L. Ed. 1451, 55 S. Ct. 713, rehearing denied 295 U. S. 769, 79 L. Ed. 1710, 55 S. Ct. 911; *Interstate Commerce Commission v. United States ex rel. Campbell* (1933) 289 U. S. 385, 77 L. Ed. 1273,

53 S. Ct. 607; * *Arizona Grocery Co. v. Atchison, T. & S. F. R. Co.* (1932) 284 U. S. 370, 76 L. Ed. 348, 52 S. Ct. 183; * *Great Northern R. Co. v. Merchants Elevator Co.* (1922) 259 U. S. 285, 66 L. Ed. 943, 42 S. Ct. 477; *Baer Bros. Mercantile Co. v. Denver & R. G. R. Co.* (1914) 233 U. S. 479, 58 L. Ed. 1055, 34 S. Ct. 641.

State Agencies.

Commissioners of Road Improvement Dist. No. 2 v. St. Louis Southwestern R. Co. (1922) 257 U. S. 547, 66 L. Ed. 364, 42 S. Ct. 250; *Louisville & N. R. Co. v. Garrett* (1913) 231 U. S. 298, 58 L. Ed. 229, 34 S. Ct. 48. See *Ohio Valley Water Co. v. Ben Avon Borough* (1920) 253 U. S. 287, 64 L. Ed. 908, 40 S. Ct. 527.

Quotations.

"Specific rates prescribed for the future take the place of the legal tariff rates theretofore in force by the voluntary action of the carriers, and themselves become the legal rates. As to such rates there is therefore no difference between the legal or published tariff rate and the lawful rate. The carrier cannot change a rate so prescribed and take its chances of an adjudication that the substituted rate will be found reasonable. It is bound to conform to the order of the Commission. If that body sets too low a rate, the carrier has no redress save a new hearing and the fixing of a more adequate rate for the future. It cannot have reparation from the shippers for a rate collected under the order upon the ground that it was

When the Interstate Commerce Commission determines a specific rate to be the reasonable and lawful rate for the future, it speaks as the legislature, and its pronouncement and direction has the force of statute.⁹³ Its action in determining the reasonableness of future rates is quasi-legislative and public in nature.⁹⁴ The fact that Congress itself could have enacted those particular rates serves to emphasize the essential legislative character of the action.⁹⁵ This rule

unreasonably low. This is true because the Commission, in naming the rate, speaks in its quasi-legislative capacity. The prescription of a maximum rate, or maximum and minimum rate, is as legislative in quality as the fixing of a specified rate." (Mr. Justice Roberts in *Arizona Grocery Co. v. Atchison, T. & S. F. R. Co.* (1932) 284 U. S. 370, 387, 388, 76 L. Ed. 348, 52 S. Ct. 183.)

"But we think it equally plain that the proceedings drawn in question here are legislative in their nature, and none the less so that they have taken place with a body which at another moment, or in its principal or dominant aspect, is a court such as is meant by § 720. A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore is an act legislative not judicial in kind, as seems to be fully recognized by the Supreme Court of Appeals, *Commonwealth v. Atlantic Coast Line R. Co.*, 106 Va. 61, 64, and especially by its learned President in his pointed remarks in *Winchester and Strasburg R. R. Co. and others v. Commonwealth*, 106 Va. 264, 281. See further *Interstate Commerce Commission v. Cincinnati, New Orleans &*

Texas Pac. R. Co., 167 U. S. 479, 499, 500, 505; *San Diego Land & Town Co. v. Jasper*, 189 U. S. 439, 440." (Mr. Justice Holmes in *Prentiss v. Atlantic Coast Line Co.* (1908) 211 U. S. 210, 226, 53 L. Ed. 150, 29 S. Ct. 67.)

⁹³ "The Hepburn Act and the Transportation Act evince an enlarged and different policy on the part of Congress. The first granted the Commission power to fix the maximum reasonable rate; the second extended its authority to the prescription of a named rate, or the maximum or minimum reasonable rate, or the maximum and minimum limits within which the carriers' published rate must come. When under this mandate the Commission declares a specific rate to be the reasonable and lawful rate for the future, it speaks as the legislature, and its pronouncement has the force of a statute. This Court has repeatedly so held with respect to the fixing of specific rates by state commissions; and in this respect there is no difference between authority delegated by state legislation and that conferred by Congressional action." (Mr. Justice Roberts in *Arizona Grocery Co. v. Atchison, T. & S. F. R. Co.* (1932) 284 U. S. 370, 385, 386, 76 L. Ed. 348, 52 S. Ct. 183.)

⁹⁴ *Baer Bros. Mercantile Co. v. Denver & R. G. R. Co.* (1914) 233 U. S. 479, 58 L. Ed. 1055, 34 S. Ct. 641.

⁹⁵ *J. W. Hampton Jr. & Co. v. United States* (1928) 276 U. S. 394, 72 L. Ed. 624, 48 S. Ct. 348.

is also applicable to the fixing of specific rates by state commissions; and in this respect there is no difference between authority delegated by state legislation and that conferred by congressional action.⁹⁶

An order based upon a determination as to divisions of future rates is the equivalent of an Act of Congress requiring the carriers to serve for the amounts specified and is quasi-legislative,⁹⁷ although in determination of divisions of rates already collected it is quasi-judicial in character.⁹⁸

A report of the Interstate Commerce Commission, finding rates unreasonable for the future, is not a definite adjudication authorizing recovery of excessive rates between the time of the report and the effective date of the rate order based on it.⁹⁹

§ 72. — Quasi-Legislative Determinations Limit Future Quasi-Judicial Determinations.

The system now administered by the Interstate Commerce Commission is dual in nature. Often in a single report and order the Commission adjudicates the reasonableness of a rate made by a carrier and orders it to pay reparation, at the same time exercising its additional authority by fixing rates or rate limits for the future.¹ But in making a quasi-judicial determination an agency may not retroactively repeal a previous quasi-legislative determination of the same matter, even though the doctrine of *res judicata* has no application to administrative determinations, as they are legislative in character and the exercise of a legislative function.² Acting in its quasi-judicial capacity, it may not ignore its own pronouncement promulgated

⁹⁶ Arizona Grocery Co. Atchison T. & S. F. R. Co. (1932) 284 U. S. 370, 76 L. Ed. 348, 52 S. Ct. 183. See Ohio Valley Water Co. v. Ben Avon Borough (1920) 253 U. S. 287, 64 L. Ed. 908, 40 S. Ct. 527; Louisville & N. R. Co. v. Garrett (1913) 231 U. S. 298, 58 L. Ed. 229, 4 S. Ct. 48.

⁹⁷ Baltimore & O. R. Co. v. United States (1936) 298 U. S. 349, 80 L. Ed. 1209, 56 S. Ct. 797.

⁹⁸ The Assigned Car Cases (1927) 274 U. S. 564, 71 L. Ed. 1204, 47 S. Ct. 727.

⁹⁹ Jeanneret v. Chicago, B. & Q. R. Co. (C. C. A. 7th, 1927) 17 F. (2d) 978, cert. den. 275 U. S. 531, 72 L. Ed. 410, 48 S. Ct. 29.

¹ Arizona Grocery Co. v. Atchison, T. & S. F. R. Co. (1930) 284 U. S. 370, 76 L. Ed. 348, 52 S. Ct. 183; Baer Bros. Mercantile Co. v. Denver & R. G. R. Co. (1914) 233 U. S. 479, 58 L. Ed. 1055, 34 S. Ct. 641.

² "The Commission in its report confuses legal concepts in stating that the doctrine of *res judicata* does not affect its action in a case like this one. It is unnecessary to determine whether an adjudication with respect to reasonableness of rates theretofore charged is binding in another proceeding, for that question is not here presented. The rule of estoppel by judgment obviously applies only to bodies exercising judicial functions; it is

previously in its quasi-legislative capacity and, as in the case of rates, retroactively repeal its own enactment as to the reasonableness of a rate previously prescribed.³ This rule applies even where the second or quasi-judicial determination is made on additional evidence, and is presumably better grounded.⁴ Where the first determination has been quasi-judicial, however, it does not bind the agency in later proceedings.⁵ Thus a finding that certain carrier-made rates are "not unreasonable" is a quasi-judicial determination which does not preclude a subsequent reparation order.⁶

manifestly inapplicable to legislative action. The Commission's error arose from a failure to recognize that when it prescribed a maximum reasonable rate for the future, it was performing a legislative function, and that when it was sitting to award reparation, it was sitting for a purpose judicial in its nature. In the second capacity, while not bound by the rule of *res judicata*, it was bound to recognize the validity of the rule of conduct prescribed by it and not to repeal its own enactment with retroactive effect. It could repeal the order as it affected future action, and substitute a new rule of conduct as often as occasion might require, but this was obviously the limit of its power, as of that of the legislature itself." (Mr. Justice Roberts in *Arizona Grocery Co. v. Atchison, T. & S. F. R. Co.* (1932) 284 U. S. 370, 389, 76 L. Ed. 348, 52 S. Ct. 183.)

3 "As has been pointed out, the system now administered by the Commission is dual in nature. As respects a rate made by the carrier, its adjudication finds the facts and may involve a liability to pay reparation. The Commission may, and often does, in the same proceeding, and in a single report and order, exercise its additional authority by fixing rates or rate limits for the future. But the fact that this function is combined with that of passing upon the rates theretofore and then in effect does not

alter the character of the action.

"As respects its future conduct the carrier is entitled to rely upon the declaration as to what will be a lawful, that is, a reasonable, rate; and if the order merely sets limits it is entitled to protection if it fixes a rate which falls within them. Where, as in this case, the Commission has made an order having a dual aspect, it may not in a subsequent proceeding, acting in its quasi-judicial capacity, ignore its own pronouncement promulgated in its quasi-legislative capacity and retroactively repeal its own enactment as to the reasonableness of the rate it has prescribed. (Mr. Justice Roberts in *Arizona Grocery Co. v. Atchison, T. & S. F. R. Co.* (1932) 284 U. S. 370, 388; 389, 76 L. Ed. 348, 52 S. Ct. 183.)

⁴ *Arizona Grocery Co. v. Atchison, T. & S. F. R. Co.* (1932) 284 U. S. 370, 76 L. Ed. 348, 52 S. Ct. 183.

⁵ *Pitzer Transfer Corp. v. Norfolk & W. R. Co.* (D. C. Md. 1935) 10 F. Supp. 436 (ICC); *Algoma Coal & Coke Co. v. United States* (D. C. E. D. Va., 1935) 11 F. Supp. 487. See *Birmingham Slag Co. v. United States* (D. C. N. D. Ala., S. Div., 1935) 11 F. Supp. 486. See also § 255.

⁶ *Pitzer Transfer Corp. v. Norfolk & W. R. Co.* (D. C. Md. 1935) 10 F. Supp. 436 (ICC). See *Birmingham Slag Co. v. United States* (D. C. N. D. Ala., S. Div., 1935) 11 F. Supp. 486.

V. ADMINISTRATIVE DECISION: INITIAL DECISIONS ON
QUESTIONS OF LAW

§ 73. Statutory Basis and Procedural Nature of the Function.

A binding decision on a question of law affecting private rights, that is, a judicial question,⁷ may only be made by an appropriate court acting judicially.⁸ But the nature of the administrative process in executing a statutory scheme requires that administrative agencies not only determine the administrative questions involved, but apply the law in the first instance as well—that is, that they also venture an initial decision on the judicial questions. Otherwise, as a practical matter, the agencies could not function.⁹ Judicial questions are usually bound up with administrative questions, and if the agency is to act by making findings and imposing a sanction it must necessarily venture an initial decision upon such judicial questions as well as determine the administrative questions. Thus the right of an administrative agency to venture an initial decision upon a judicial question is implied wherever a statute authorizes an administrative proceeding which may, in the proper discharge of expressly conferred duties, necessarily involve a decision of a judicial question.¹⁰ For instance, judicial questions are explicitly given to agencies for primary decision by the Federal Trade Commission Act,¹¹ although this appears to be the broadest delegation of that nature. Most statutes obviously imply authority to venture an initial decision upon judicial questions which are bound up in a particular administrative proceeding specifically authorized by statute. And in such case administrative remedies must be exhausted with respect to such questions before judicial relief may be sought.¹²

But an agency may not venture an initial decision upon a particular judicial question where a statute does not imply power to do so in the particular administrative proceeding involved.¹³ Thus if a statu-

⁷ See § 423 et seq.

⁸ See §§ 41, 423 et seq.

⁹ See John Dickinson in "Administrative Justice and the Supremacy of Law," (1927) p. 99.

¹⁰ *West v. Standard Oil Co.* (1929) 278 U. S. 200, 73 L. Ed. 265, 49 S. Ct. 138.

¹¹ 15 USCA 41 et seq. "unfair methods of competition," *Federal Trade Commission v. Algoma Lumber Co.* (1934) 291 U. S. 67, 78 L. Ed.

655, 54 S. Ct. 315; *Federal Trade Commission v. R. F. Keppel & Bro.* (1934) 291 U. S. 304, 78 L. Ed. 814, 54 S. Ct. 423. See *Federal Trade Commission v. Sinclair Refining Co.* (1923) 261 U. S. 463, 67 L. Ed. 746, 43 S. Ct. 450.

¹² See § 237.

¹³ *Powell v. United States* (1937) 300 U. S. 276, 81 L. Ed. 643, 57 S. Ct. 470.

tory scheme implies that a particular judicial question may be initially decided by an administrative agency in a particular type of administrative proceeding, the agency has no jurisdiction to venture a decision upon that question in a different type of administrative proceeding.¹⁴ So where the Interstate Commerce Commission directed that a tariff extending switching limits to include a new station and trackage be "stricken from the files" on the ground that the use of the new trackage would violate section 1 (18) of the Act which prohibits use of an "extension" without the Commission's approval, its order was set aside because whether the new trackage constituted an "extension" was a judicial question which the agency had not been given jurisdiction to decide initially in the particular administrative proceeding then involved.¹⁵

§ 74. Constitutional Limitation on the Function: Initial Decision May Never Be Binding.

Except in cases involving a bounty or gratuity,¹⁶ this is not to imply that an administrative agency may make a binding decision upon a judicial question.¹⁷ A "decision" or "finding" by an administrative agency upon a judicial question is never a binding decision, for under the doctrines of supremacy of law and the separation of powers a binding decision of a question of law affecting private rights may only be made by an appropriate court acting judicially. Thus, although as a practical or procedural matter an administrative agency must venture a decision upon such a question of law, such questions are always open for the independent judgment of an appropriate court acting judicially.¹⁸ Hence constitutional questions, the highest type of judicial question, must be decided by an appropriate court acting

¹⁴ *Powell v. United States* (1937) (80 U. S.) 72, 20 L. Ed. 485. See also 300 U. S. 276, 81 L. Ed. 643, 57 S. Ct. 470. § 425.

¹⁵ *Powell v. United States* (1937) 300 U. S. 276, 81 L. Ed. 643, 57 S. Ct. 470.

¹⁶ See § 426.

¹⁷ John Dickinson in "Administrative Justice and the Supremacy of Law," (1927) pp. 32-38.

¹⁸ See *American School of Magnetic Healing v. McAnnulty* (1902) 187 U. S. 94, 47 L. Ed. 90, 23 S. Ct. 33; *Johnson v. Towsley* (1891) 13 Wall.

"Although the Postmaster General had jurisdiction over the subject-matter (assuming the validity of the acts) and therefore it was his duty upon complaint being made to decide the question of law whether the case stated was within the statute, yet such decision being a legal error does not bind the courts." (Mr. Justice Peckham in *American School of Magnetic Healing v. McAnnulty* (1902) 187 U. S. 94, 110, 111, 47 L. Ed. 90, 23 S. Ct. 33.)

judicially, and the facts upon which the decision of a constitutional question depends must be tried *de novo* in the reviewing court in order that it may exercise an independent judgment on both law and facts.¹⁹ And a binding decision on a simple judicial question, such as a question of statutory construction, may only be made by an appropriate court acting judicially.²⁰ Upon judicial review a previous venture at a decision of any judicial question by an administrative agency is seldom of significance, because a legislative agency cannot exercise judicial power.²¹ Only where the judicial question concerns construction of an ambiguous statute is an administrative construction significant.²²

There are of course countless instances where judicial review of administrative action is not sought and an administrative venture at decision of a judicial question is accepted by the parties as controlling. This is a purely practical result. It is usually due to the fact that the judicial questions involved have been settled by previous judicial decision; to the burdensome character and expense of judicial review; or simply because the parties affected are satisfied by the administrative decision as being in accord with what a judicial decision is likely to be, and thus intentionally fail to seek judicial review.

The fact that judicial questions are involved in administrative findings and sanctions often does not at once strike the eye. Where made by an established agency, the appropriate decision of particular judicial questions involved often seems elementary because of settled judicial decisions or rudimentary legal principles. These factors, however, do not weaken the judicial character of the questions.

§ 75. Effect on Administrative Law; The Separation of Powers.

Nevertheless, this procedural factor of permitting an agency to venture a decision upon a judicial question even though it is not binding, has caused incalculable confusion in administrative law because it tends to blur the profound differences between judicial and administrative questions. Administrative procedure frequently lacks the precision and candor implicit in equity decisions where detailed findings of fact and conclusions of law are made. Keen and painstaking analysis is often necessary to ascertain exactly what has been determined or decided by an administrative report which makes no attempt to distinguish between determinations of fact and initial de-

¹⁹ See § 262 et seq.

²⁰ See § 425.

²¹ See § 424.

²² See § 475 et seq.

cisions of the law. For instance, it has been frequently said that the doctrine of separation of powers has disappeared with the growth of administrative law. But nothing is further from the truth. The integrity of the judicial power is not theoretically or practically impaired because an administrative agency may venture an initial decision upon a judicial question, which is not binding or *res judicata*, and which remains open for judicial review.²³ The most that can be said is that the practical difficulties of judicial review may tend to give an administrative decision of a judicial question more practical weight than may be theoretically desirable.

An administrative agency as a fact-finding body is unlike a jury since it lacks the contemporaneous guidance of a court on legal questions. It better resembles a special master or referee, learned in the law, who must venture decisions on questions of law subject to court supervision, as well as make determinations of fact.

It has always been obviously necessary for Congress initially to decide constitutional questions, which present the highest type of judicial question, in its enactment of legislation of general application, subject to judicial review on those questions. This procedural necessity on the part of Congress of venturing an initial decision upon constitutional questions involved in legislation of general application is directly analogous to the equivalent necessity for Congress' administrative agents to venture initial decisions on whatever judicial questions are involved in the making of legislative determinations in a particular case. Even a policeman may not make an arrest without venturing a decision upon the law. But in all these instances it would appear that the substance of the doctrines of supremacy of law and separation of powers have become deeper rooted than ever, due to the fact that it has become clearer as time has gone on that a binding decision on a judicial question may only be made by an appropriate court acting judicially.

VI. ADMINISTRATIVE SANCTIONS: POWER TO APPLY THE LEGISLATIVE MANDATE

§ 76. In General.

The controlling statute setting up an administrative scheme defines the subject and manner of regulation and the policy, standard or rule of conduct for application of its regulatory mandate. Thus the Inter-

²³ See § 425.

state Commerce Act states that "every unjust and unreasonable charge" for transportation "is prohibited and declared to be unlawful,"²⁴ and that the Interstate Commerce Commission is authorized and empowered "to make an order that the carrier or carriers shall cease and desist" from charging unjust or unreasonable rates or charges.²⁵ A policy, standard, or rule of conduct of the Act thus prohibits the charging of unreasonable rates and charges. Upon determination by the Commission that particular rates are unreasonable, it may therefore order the carrier to "cease and desist" from charging the particular rates to the extent that they are unreasonable. The command to "cease and desist" is the administrative sanction. It merely applies the regulatory mandate of the statute to a particular party upon making the requisite finding that the legislative standard, policy, or rule of conduct for application of the mandate exists in a particular case.²⁶ An administrative sanction is usually the substance of an administrative "order." Findings or determinations ordinarily constitute the subject of an administrative report.

§ 77. Administrative Sanction, Being Legislative, is Subject to Constitutional Limitations.

The sanction of an administrative agency which exercises legislative powers is action of the government which gave the authority, and is itself legislative. It is therefore subject to judicial review as such.²⁷ It is thus subject to the Fifth²⁸ and Fourteenth Amendments,²⁹ and to the other requirements and limitations of the Constitution.³⁰ Hence an administrative sanction may not be made to operate retroactively.³¹

²⁴ 49 USCA 1(5).

²⁵ 29 USCA 15(1).

²⁶ *Arizona Grocery Co. v. Atchison, T. & S. F. R. Co.* (1932) 284 U. S. 370, 76 L. Ed. 348, 52 S. Ct. 183.

²⁷ *The Chicago Junction Case* (1924) 264 U. S. 258, 68 L. Ed. 667, 44 S. Ct. 317.

²⁸ See *Arizona Grocery Co. v. Atchison, T. & S. F. R. Co.* (1932) 284 U. S. 370, 76 L. Ed. 348, 52 S. Ct. 183.

²⁹ See *City of El Paso v. Texas Cities Gas Co.* (C. C. A. 5th, 1938) 100 F. (2d) 501, cert. den. 306 U. S. 650,

83 L. Ed. 1049, 59 S. Ct. 592; *Los Angeles R. Corp. v. Railroad Commission* (D. C. Cal. 1928) 29 F. (2d) 140, aff'd 280 U. S. 145, 74 L. Ed. 234, 50 S. Ct. 71 (1929).

³⁰ *Arizona Grocery Co. v. Atchison T. & S. F. R. Co.* (1932) 284 U. S. 370, 76 L. Ed. 348, 52 S. Ct. 183; *Atchison, T. & S. F. R. Co. v. United States* (1932) 284 U. S. 248, 76 L. Ed. 273, 52 S. Ct. 146.

³¹ *United States v. Baltimore & O. R. Co.* (1931) 284 U. S. 195, 76 L. Ed. 243, 52 S. Ct. 109.

§ 78. Validity of Administrative Sanction Dependent Upon (1) Validity of the Statute, and (2) Its Appropriateness for the Facts Found.

The validity of an administrative sanction may be tested only in two ways, (1) its legal appropriateness for the facts found,³² and (2) its validity, under principles of constitutional law, as part of the statute itself, without involving any question of administrative action.³³ The findings as to the existence of the legislative policy, standard or rule of conduct constitute the jurisdictional basis for an administrative sanction, and are said to be quasi-judicial.³⁴

§ 79. Administrative Sanction Determines Time of Legislative Action.

Where authority is properly delegated to an administrative agency, the legislative power has not been exercised until the agency has acted.³⁵ Thus where Congress has given power to the Federal Communications Commission to prescribe depreciation rates for intrastate telephone companies, Congress does not intend to preclude state action in the prescribing of such rates until the Commission has acted.³⁶ Once, however, the Commission has acted, federal regulatory power has been exercised and further state action is precluded.

§ 80. Implied Power to Prevent Evasion of Sanction.

An administrative agency has implied power to prevent, by appropriate ancillary direction in its orders, possible methods of evasion of a primary sanction applying a legislative mandate, or possible concealment of forbidden practices, even in the absence of express statutory authority.³⁷

§ 81. No Power to Inflict Punishment and Imprisonment.

An administrative agency, however, may not have power to imprison and punish. It may not find the fact of guilt and adjudge

³² See § 437.

³³ See § 2.

³⁴ See § 550.

³⁵ *Northwestern Bell Telephone Co. v. Nebraska State Railway Commission* (1936) 297 U. S. 471, 80 L. Ed. 810, 56 S. Ct. 536.

³⁶ *Northwestern Bell Telephone Co. v. Nebraska State Railway Commis-*

sion (1936) 297 U. S. 471, 80 L. Ed. 810, 56 S. Ct. 536. See also *Missouri Pac. R. Co. v. Larabee Flour Mills Co.* (1909) 211 U. S. 612, 53 L. Ed. 352, 29 S. Ct. 214.

³⁷ *American Telephone & Telegraph v. United States* (1936) 299 U. S. 232, 81 L. Ed. 142, 57 S. Ct. 170.

the punishment for a criminal act. A statute purporting to confer such authority is unconstitutional.³⁸

³⁸ "No limits can be put by the courts upon the power of Congress to protect, by summary methods, the country from the advent of aliens whose race or habits render them undesirable as citizens, or to expel such if they have already found their way into our land and unlawfully remain therein. But to declare unlawful residence within the country to be an infamous crime, punishable by deprivation of liberty and property, would be to pass out of the sphere of con-

stitutional legislation, unless provision were made that the fact of guilt should first be established by a judicial trial. It is not consistent with the theory of our government that the legislature should, after having defined an offence as an infamous crime, find the fact of guilt and adjudge the punishment by one of its own agents." (Mr. Justice Shiras in *Wong Wing v. United States* (1896) 163 U. S. 228, 237, 41 L. Ed. 140, 16 S. Ct. 977.)

CHAPTER 3

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I. IN GENERAL

§ 82. Historical Evolution of the Agencies.

The first important federal administrative agency was the Interstate Commerce Commission, set up by the Act of February 4, 1887.¹ In the process of adjusting relations between it and courts to effectuate the purposes of the Act, the Supreme Court evolved many of the legal principles which are now applied generally to administrative agencies.² Time and again analogy to a new agency's powers and conduct has been drawn from those of the Interstate Commerce Commission.

¹ Chap. 104, § 14, 24 Stat. 379.

² For the tendency to open discussion of the law as to other agencies by reference to the Interstate Com-

merce Commission, see *Louisville & N. R. Co. v. Finn* (1915) 235 U. S. 601, 59 L. Ed. 379, 35 S. Ct. 146. See also § 142.

It has given rise to more litigated cases in the courts than any other agency.³

The history, antecedent functions, and transfer of functions, of the various agencies is to be found elsewhere.⁴

§ 83. General Functions: Legislative Powers.

Generally speaking, an administrative agency is either a body or tribunal,⁵ or an officer⁶ in the executive branch of the government, which acts as the administrative arm of the legislature in exercising specific powers and discharging particular duties committed by statute.⁷ In so acting as the administrative arm of the legislature it is necessarily free from executive interference.⁸

The constitutional implications of the nature of power exercised give a particular administrative agent character and create the legal principles applicable to its conduct. Broadly speaking, a purely executive agent or official ordinarily exercises only ministerial powers, particularly in the case of minor departmental officials. But the situ-

³ See *Louisville & N. R. Co. v. Garrett* (1913) 231 U. S. 298, 58 L. Ed. 229, 34 S. Ct. 48.

⁴ See the Final Report of the Attorney General's Committee on Administrative Procedure (1941) Appendix C, p. 276.

For a general discussion of types of administrative agencies, see A. H. Feller, "Prospectus for the Further Study of Federal Administrative Law," (1938) 47 Yale L. Jour. 647.

⁵ E. g., the Interstate Commerce Commission, *Shields v. Utah Idaho C. R. Co.* (1938) 305 U. S. 177, 83 L. Ed. 111, 59 S. Ct. 160. See the agencies listed *post*.

⁶ E. g., the Secretary of the Treasury, *Helvering v. Winmill* (1938) 305 U. S. 79, 83 L. Ed. 52, 59 S. Ct. 45; the Comptroller of the Treasury, *Southern Pacific Co. v. United States* (1939) 307 U. S. 393, 83 L. Ed. 1363, 59 S. Ct. 923; the Commissioner of Internal Revenue, *McCrone v. United States* (1939) 307 U. S. 61, 83 L. Ed. 1108, 59 S. Ct. 685; the Secretary of Agriculture, *United States v. Morgan*

(1939) 307 U. S. 183, 83 L. Ed. 1211, 59 S. Ct. 795; *United States v. Rock Royal Co-Operative, Inc.* (1939) 307 U. S. 533, 83 L. Ed. 1446, 59 S. Ct. 993; *H. P. Hood & Sons, Inc. v. United States* (1939) 307 U. S. 588, 83 L. Ed. 1478, 59 S. Ct. 1019; the Secretary of Labor, *Kessler v. Strecker* (1939) 307 U. S. 22, 83 L. Ed. 1082, 59 S. Ct. 694; *Perkins v. Elg* (1939) 307 U. S. 325, 83 L. Ed. 1320, 59 S. Ct. 884; a Deputy Commissioner of Compensation, *Crowell v. Benson* (1932) 285 U. S. 22, 76 L. Ed. 598, 52 S. Ct. 285, or the Secretary of War, *Monongahela Bridge Co. v. United States* (1910) 216 U. S. 177, 54 L. Ed. 435, 30 S. Ct. 356.

⁷ See § 8 *et seq*.

⁸ To maintain this independence Congress can fix the term of Commissioners and prescribe the sole causes for their removal. The executive cannot remove during the term fixed except for a cause prescribed. *Humphrey v. United States* (1935) 295 U. S. 602, 79 L. Ed. 1611, 55 S. Ct. 869.

ations arising from the exercise by administrative agencies of delegated powers of a legislative character which affect private rights, has focused attention upon the agencies which possess such powers, and it may almost be said that the term "administrative agency" now commonly refers, virtually in the sense of a secondary meaning, to agencies which possess those powers. It is their function as agents of the legislature that has given rise to the bulk of principles of administrative law. And for the administrative agencies which are delegates of Congress, the doctrine of separation of powers requires that they be independent of other branches of the government, lest the ends sought by Congress be thwarted. Thus where Congress fixes the term and conditions of tenure of office of a commission member, the President has no power of removal not given him in the statute,⁹ although he is not so restricted with purely executive agents not exercising delegated legislative powers.¹⁰ The head of an executive department of the government, such as the Secretary of Agriculture, may be the delegate of certain legislative powers, and in the exercise of those powers his conduct is governed by the legal principles applicable to administrative agencies generally rather than those applicable to an executive department.¹¹ The ultimate criterion is the nature of the power exercised.

§ 84. — Executive Powers.

There are administrative agencies which do not exercise powers of a legislative character and were not even created by the legislature, but were established by the President under his constitutional powers as Chief Executive.

For instance, the War Industries Board of 1918 was originally established as an effective agency by a letter dated March 4, 1918 from President Wilson to Mr. Baruch, without any legislative authority, and presumably by virtue of the powers vested in the President by Article II of the Constitution. The Overman Act, approved May 20, 1918,¹² stated that for, among other purposes, "the more effective exercise and more efficient administration by the President of his powers as Commander in Chief of the land and naval Forces the President is hereby authorized to make such redistribution of functions

⁹ *Humphrey v. United States* (1935)
295 U. S. 602, 79 L. Ed. 1611, 55 S. Ct.
869.

¹⁰ *Myers v. United States* (1926)
272 U. S. 52, 71 L. Ed. 160, 47 S. Ct.
21.

¹¹ *Morgan v. United States* (1936)
298 U. S. 468, 80 L. Ed. 1288, 56 S. Ct.
906.

¹² 40 Stat. 556.

among executive agencies as he may deem necessary . . .” President Wilson’s subsequent executive order No. 2868, of May 28, 1918 stated simply “I hereby establish the War Industries Board as a separate administrative agency to act for me and under my direction,” and referred back to his letter of March 4, 1918 for an outline of its functions, duties and powers.

A somewhat comparable agency, the Office of Production Management of 1940 (the “OPM”) subordinate to and coordinated through the office of Emergency Management within the executive office of the President, was established by President Roosevelt’s executive order No. 8629 dated January 7, 1941, “By virtue of the authority vested in me by the Constitution and the statutes. . . .”

The functions, powers and duties of these agencies are executive, rather than legislative, in character, and ordinarily do not involve adversary proceedings or adjudicatory functions comparable to those conducted and exercised by legislative agencies.

II. EXECUTIVE DEPARTMENTS DISTINGUISHED

§ 85. In General.

An executive department of the government, as such, is not an administrative agency in the accepted use of the term, since it does not exercise discretion or powers of a legislative character, but merely administers a declared plan of Congress through the discharge of ministerial duty. Administrative agencies may also be under ministerial duties, and failure by any agency to perform a ministerial duty may be subject to the legal remedy of mandamus.¹³

However, the head or other officer of an executive department may become the delegate of legislative powers and to that extent an administrative arm of the legislature or administrative agency in the accepted use of the term.¹⁴ In this instance the department, as such, does

¹³ See § 688 et seq.

¹⁴ See *Houston v. St. Louis Independent Packing Co.* (1919) 249 U. S. 479, 63 L. Ed. 717, 39 S. Ct. 332.

In an opinion written to the President in 1854 the Attorney General described the tripartite relations of the heads of executive departments, stating that “heads of departments have a threefold relation, namely: 1. To the President, whose political or confidential ministers they are, to

execute his will, or rather to act in his name and by his constitutional authority, in cases in which the President possesses a constitutional or legal discretion; 2. To the law; for where the law has directed them to perform certain acts, and where the rights of individuals are dependent on those acts, then, in such cases, a head of department is an officer of the law, and amenable to the laws for his conduct (*Marbury v. Madison*,

not become an agency, and indeed may not constitutionally become so.¹⁵ Only the officer or group designated constitutes the administrative agency, and must discharge its functions independently of duties as a member of the executive department.¹⁶

III. GOVERNMENT CORPORATIONS DISTINGUISHED

§ 86. In General.

Government corporations are to be distinguished from administrative agencies.¹⁷ In form they are private corporations, organized under the laws of a state or of the District of Columbia,¹⁸ or created by Congress,¹⁹ and to a considerable extent they compete with private business.²⁰ They exercise no quasi-judicial or quasi-legislative function. They are often formed, pursuant to statutory authority, by administrative agencies or executive officers which hold all or a majority of their stock and are charged with their administration. They are instrumentalities of the government.²¹ They are also con-

1 Cranch (5 U. S.) 137.). And 3. To Congress, in the conditions contemplated by the Constitution.

"This latter relation, that of the departments to Congress, is one of the great elements of responsibility and legality in their action. They are created by law; most of their duties are prescribed by law; Congress may at all times call on them for information or explanation in matters of official duty; and it may, if it sees fit, interpose by legislation concerning them, when required by the interests of the Government." (1854) 6 Op. Atty. Gen. 326.

¹⁵ See § 313.

¹⁶ See § 313.

¹⁷ *United States ex rel. Skinner & Eddy Corp. v. McCarl* (1927) 275 U. S. 1, 72 L. Ed. 131, 48 S. Ct. 12; *United States Shipping Board Emergency Fleet Corp. v. Western Union Telegraph Co.* (1928) 275 U. S. 415, 72 L. Ed. 345, 48 S. Ct. 198.

See "The Corporation as a Federal Administrative Device," (1935) 83 *Univ. of Pa. L. Rev.* 346; John A. McIntire in "Government Corpora-

tions as Administrative Agencies: an Approach" (1936) 4 *Geo. Wash. L. Rev.* 161. Articles dealing with government corporations are collected in Gellhorn, "Cases and Comments on Administrative Law" (1940), p. 330.

¹⁸ *United States ex rel. Skinner & Eddy Corp. v. McCarl* (1927) 275 U. S. 1, 72 L. Ed. 131, 48 S. Ct. 12.

¹⁹ *The Tennessee Valley Authority*, 16 *USCA* 831; the *Reconstruction Finance Corporation*, 15 *USCA* 601-617; the *Textile Foundation*, 15 *USCA* 501.

²⁰ *United States Shipping Board Emergency Fleet Corp. v. Western Union Telegraph Co.* (1928) 275 U. S. 415, 72 L. Ed. 345, 48 S. Ct. 198.

²¹ *United States ex rel. Skinner & Eddy Corp. v. McCarl* (1927) 275 U. S. 1, 72 L. Ed. 131, 48 S. Ct. 12; *Posey v. Tennessee Valley Authority* (C. C. A. 5th, 1937) 93 F. (2d) 726.

"Government-owned private corporations were employed by the United States as its instrumentalities in several other fields during the World War. The Food Administration Grain Corporation (later called the United

sidered "departments" of the government for some purposes, such as the enjoyment of government telegraph rates,²² yet are entities distinct from the United States and from any of the departments or boards.²³ Being private corporations, they may be sued in state or federal courts like other private corporations unless endowed with governmental immunity.²⁴ They do not enjoy the priority of the United States in bankruptcy proceedings,²⁵ and the audit and control of their financial transactions is, under the general rules of law, and administrative practice, committed to their own officers rather than to the general accounting officers of the government.²⁶ Indeed, an important, if not the chief reason for employing these incorporated agencies was to enable them to employ commercial methods and to con-

States Grain Corporation) was organized under the laws of Delaware under the Food Control Act, August 10, 1917, c. 53, § 19, 40 Stat. 276. See Act of March 4, 1919, c. 125, 40 Stat. 1348, and Executive Orders, August 14, 1917, March 4, 1919. The United States Spruce Corporation was organized by the Director of Air Craft Production under the laws of the District of Columbia, pursuant to the Act of July 9, 1918, c. 143, 40 Stat. 845, 888-889, for the purpose of aiding in the production of aircraft material. The United States Housing Corporation was organized under the laws of the District of Columbia by authority of the President, for the purpose of providing housing for war needs under the Act of June 4, 1918, c. 92, 40 Stat. 594, 595. The War Finance Corporation was organized under the Act of April 5, 1918, c. 45, 40 Stat. 506, to assist financially, industries important to the successful prosecution of the War. For many years before the War, the Government had employed the Panama Railroad Company as its instrumentality in connection with the Canal. And, since the War, the Inland Waterways Corporation has been organized by the Secretary of War to operate the Government-owned inland waterways

system pursuant to the Act of June 3, 1924, c. 243, 43 Stat. 360. The Government likewise has established, and holds all the stock in the Federal Intermediate Credit Banks, formed under the Act of March 4, 1923, c. 252, § 205, 42 Stat. 1454, 1457, to bring about easier agricultural credits." (Mr. Justice Brandeis in *United States ex rel. Skinner & Eddy Corp. v. McCarl* (1927) 275 U. S. 1, 6, 7, 72 L. Ed. 131, 48 S. Ct. 12.)

²² *United States Shipping Board Emergency Fleet Corp. v. Western Union Telegraph Co.* (1928) 275 U. S. 415, 72 L. Ed. 345, 48 S. Ct. 198.

²³ *United States ex rel. Skinner & Eddy Corp. v. McCarl* (1927) 275 U. S. 1, 72 L. Ed. 131, 48 S. Ct. 12. See *United States v. Fontenot* (D. C. W. D. La., Opelousas Div., 1940) 33 F. Supp. 629.

²⁴ *Keifer & Keifer v. Reconstruction Finance Corp.* (1939) 306 U. S. 381, 83 L. Ed. 784, 59 S. Ct. 516; *United States ex rel. Skinner & Eddy Corp. v. McCarl* (1927) 275 U. S. 1, 72 L. Ed. 131, 48 S. Ct. 12.

²⁵ *United States ex rel. Skinner & Eddy Corp. v. McCarl* (1927) 275 U. S. 1, 72 L. Ed. 131, 48 S. Ct. 12.

²⁶ *United States ex rel. Skinner & Eddy Corp. v. McCarl* (1927) 275 U. S. 1, 72 L. Ed. 131, 48 S. Ct. 12.

duct their operations with a freedom supposed to be inconsistent with accountability to the Treasury under its established procedure of audit and control over the financial transactions of the United States.²⁷

§ 87. The Emergency Fleet Corporation.

The Emergency Fleet Corporation was organized by the United States Shipping Board pursuant to specific statutory authority.²⁸ After the passage of the Merchant Marine Act of 1920²⁹ the Fleet Corporation was the agency through which the Shipping Board performed its principal functions.³⁰ The activities consisted largely of maintaining and liquidating property acquired for the United States during the World War, of settling claims arising therefrom, and of operating or causing to be operated vessels not disposed of.³¹ While it thus competed with privately owned vessels, it was required by the statute to proceed with a view to aiding in the development of an adequate merchant marine to serve, *inter alia*, as a naval and military auxiliary in time of war or national emergency, ultimately to be owned and operated privately by citizens of the United States.³² On and after February 11, 1927 the corporation was known as the United States Shipping Board Merchant Fleet Corporation,³³ and on June 29, 1936 it was dissolved.³⁴

IV. TYPES OF FUNCTIONS OF ADMINISTRATIVE AGENCIES

§ 88. Advisory Agencies.

The Tariff Commission has no power to determine or alter legal rights, but merely makes findings of an advisory nature.³⁵ Since the Tariff Commission has no power to determine or alter legal rights the requisites of procedural due process are not strictly applicable to its proceedings.³⁶

²⁷ United States ex rel. Skinner & Eddy Corp. v. McCarl (1927) 275 U. S. 1, 72 L. Ed. 131, 48 S. Ct. 12.

²⁸ 46 USCA 801-842.

²⁹ 46 USCA 861 et seq.

³⁰ United States Shipping Board Emergency Fleet Corp. v. Western Union Telegraph Co. (1928) 275 U. S. 415, 72 L. Ed. 345, 48 S. Ct. 198.

³¹ United States Shipping Board Emergency Fleet Corp. v. Western Union Telegraph Co. (1928) 275 U. S. 415, 72 L. Ed. 345, 48 S. Ct. 198.

³² United States Shipping Board Emergency Fleet Corp. v. Western Union Telegraph Co. (1928) 275 U. S. 415, 72 L. Ed. 345, 48 S. Ct. 198.

³³ 46 USCA 810a.

³⁴ 46 USCA 1113.

³⁵ Norwegian Nitrogen Products Co. v. United States (1933) 288 U. S. 294, 77 L. Ed. 796, 53 S. Ct. 350; Ex parte Bakelite Corp. (1929) 279 U. S. 438, 73 L. Ed. 789, 49 S. Ct. 411.

³⁶ Norwegian Nitrogen Products Co. v. United States (1933) 288 U. S. 294, 77 L. Ed. 796, 53 S. Ct. 350.

§ 89. Agencies Which Exercise Special Functions: Gratuity Cases.

Administrative agencies may be set up as special tribunals for special functions which do not affect private rights. Where an administrative agency sits not to determine a private right, but to determine whether a particular party should receive a gratuity conferred by Congress, concerning which there are no legal rights, the judicial aspects of determinations involving private rights are not present. Accordingly the right to judicial review, and the other constitutional or legal rights of private parties do not exist in these circumstances. Such an instance occurs when the Interstate Commerce Commission, acting under special legislation, disposes of a bounty of Congress intended to compensate railroads for the consequences of governmental control in 1917.³⁷ Other instances include the power of the Secretary of the Interior and subordinate officers in the Land Department to dispose of public lands,³⁸ the power of the Veterans' Administration over pensions,³⁹ and questions relating to public contracts of the government.⁴⁰

§ 90. Questions of Public and Private Right.

There are three types of agencies:

- (1) those determining pure questions of public right,
- (2) those determining questions of public right against private right, and
- (3) those determining questions of private right only.

Some agencies determine all three types of question in connection with various functions.

Agencies which determine only matters of public right usually act entirely within the government and their action does not affect private rights or litigants. Consequently their action is not the subject of litigated cases.

Administrative determinations in cases which arise between the government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments, are to be distinguished from those which arise in cases of private right.⁴¹

³⁷Butte, Anaconda & Pacific R. Co. v. United States (1933) 290 U. S. 286 U. S. 290, 76 L. Ed. 1111, 52 S. Ct. 529.

127, 78 L. Ed. 222, 54 S. Ct. 108; Great Northern R. Co. v. United States (1928) 277 U. S. 172, 72 L. Ed. 838, 48 S. Ct. 466. See Continental Tie & Lumber Co. v. United States (1932)

³⁸ See § 694.

³⁹ See §§ 135, 694.

⁴⁰ See § 187 et seq.

⁴¹ Crowell v. Benson (1932) 285 U. S. 22, 76 L. Ed. 598, 52 S. Ct. 285.

Familiar illustrations of administrative agencies created for the determination of questions of public right against private right are found in connection with the exercise of the congressional power as to interstate and foreign commerce, taxation, immigration, the public lands, public health, the facilities of the post office, pensions, payments to veterans,⁴² and relations between labor and industry.⁴³ The quasi-legislative action of agencies which prescribe a rule for the future is in its nature public,⁴⁴ and such agencies determine questions of public right against private right. The public nature of the determinations of such agencies and the fact that public interests may be involved, operate to authorize continuing a proceeding to a conclusive determination, even where the original moving party has moved to dismiss its application, petition or complaint.⁴⁵

The bulk of the functions of federal administrative agencies are those determining questions of public right against private right.

Determinations in cases of private right, that is, of the liability of one individual to another under the law as defined, may be made by administrative agencies. There is no requirement that, in order to maintain the essential attributes of the judicial power, all determinations of fact shall be made by judges.⁴⁶ Administrative determinations arising in cases of private right only are to be distinguished from those which arise in cases between the government and persons subject to its authority.⁴⁷ The quasi-judicial action of agencies in giving reparation for the past is in its nature private.⁴⁸

V. FEDERAL AGENCIES

§ 91. Introduction.

The succeeding discussion of particular agencies is given to sketch a brief panorama of the scope of the powers of the important agencies, sufficient for identification and to indicate where background of various functions of the agencies may be found in the cases. No analysis of the history, functions, and procedure of a particular agency

⁴² Crowell v. Benson (1932) 285 U. S. 22, 76 L. Ed. 598, 52 S. Ct. 285.

⁴³ National Labor Relations Board v. Colten (C. C. A. 6th, 1939) 105 F. (2d) 179.

⁴⁴ Baer Bros. Mercantile Co. v. Denver & R. G. R. Co. (1914) 233 U. S. 479, 58 L. Ed. 1055, 34 S. Ct. 641.

⁴⁵ Sunshine Anthracite Coal Co. v. National Bituminous Coal Commis-

sion (C. C. A. 8th, 1939) 105 F. (2d) 559, cert. den. 308 U. S. 604, 84 L. Ed. 100, 60 S. Ct. 142.

⁴⁶ See § 5.

⁴⁷ Crowell v. Benson (1932) 285 U. S. 22, 76 L. Ed. 598, 52 S. Ct. 285.

⁴⁸ Baer Bros. Mercantile Co. v. Denver & R. G. R. Co. (1914) 233 U. S. 479, 58 L. Ed. 1055, 34 S. Ct. 641.

is complete without examination of the Monographs of the Attorney General's Committee on Administrative Procedure.^{48a}

Some of the agencies discussed below have passed out of existence, usually having been replaced by successors. These obsolete agencies may nevertheless be important because of leading cases involving their determinations that lay down legal principles which are generally applicable to administrative action.

The substantive law in the regulatory fields such as transportation, trade and labor practices, and the like, can be readily found in the statutes. Statutory provisions relating to judicial review of the action of particular agencies are set forth in Appendix A. It is to be noted that the absence of statutory provisions for judicial review does not preclude judicial review where a case or controversy under Article III of the Constitution is established.^{48b}

As for the agencies themselves, it is important, in view of the procedural due process requirement that the one who decides must hear,^{48c} that each agency be specifically and precisely identified, rather than loosely referred to as a "Department." Definite responsibility should be placed upon an agency which exercises adjudicatory functions.

§ 92. Administrator of Veterans' Affairs.

The Administrator of Veterans' Affairs,^{48d} under the direction of the President, administers the functions, powers and duties which prior to July 3, 1930 were conferred upon the Commissioner of Pensions, the Board of Managers of the National Home for Disabled Volunteer Soldiers, and the Director of United States Veterans' Bureau.⁴⁹ The statutory provisions dealing with veterans' affairs create some legal rights in private persons⁵⁰ which may be enforced by mandamus⁵¹ or suit under the Tucker Act.⁵²

§ 93. Administrator of the Wage and Hour Division.

The Administrator of the Wage and Hour Division of the Department of Labor is charged with administration of the Fair Labor

^{48a} There are 27 of these Monographs, printed in two series. The first set was printed in 13 parts as Senate Document No. 186, 76th Congress, 3rd Session. The second set was printed in 14 parts as Senate Document No. 10, 77th Congress, 1st Session. All the Monographs were originally issued in mimeographed form, numbered consecutively.

^{48b} See § 650.

^{48c} See § 310 et seq.

^{48d} See § 135.

⁴⁹ 38 USCA 11a.

⁵⁰ 5 USCA 736a. See 38 USCA 612, 613.

⁵¹ See § 688 et seq.

⁵² 28 USCA 41(20). See *Dismuke v. United States* (1936) 297 U. S. 167, 80 L. Ed. 561, 56 S. Ct. 400, rehearing denied 297 U. S. 728, 80 L. Ed. 1011, 56 S. Ct. 594.

Standards Act of 1938.⁵³ The Administrator's decisions are not subject to review by the Secretary of Labor.

§ 94. Board of Tax Appeals.

The statute under which it functions⁵⁴ states that the Board of Tax Appeals shall be continued as an independent agency in the executive branch of the government. It is not a court, but an executive or administrative board, and subject to the same rules as other administrative agencies.⁵⁵ And it may be said to be in the nature of an appellate administrative agency. Its function is administrative review of determinations of the Commissioner of Internal Revenue.⁵⁶

§ 95. Board of Tea Appeals.

The Act of March 2, 1897⁵⁷ provides for the establishment of standards "of purity, quality, and fitness for consumption, of all kinds of tea imported," and makes unlawful the importation of tea inferior to such standards. The United States Board of Tea Appeals consists of three employees of the Department of Agriculture designated by the Secretary of Agriculture. The Secretary shall fix and establish uniform standards of purity, quality and fitness for consumption, for tea imported. Examination is first made by an examiner at the port of entry, and in case the collector, importer or consignee shall protest against the finding of the examiner, the matter in dispute shall be referred for decision to the United States Board of Tea Appeals.⁵⁸

§ 96. Civil Aeronautics Authority.

The Civil Aeronautics Act of 1938 established the Civil Aeronautics Authority, with an Administrator thereof.⁵⁹ Under the President's

⁵³ 29 USCA 201-219. See Monograph No. 12 of the Attorney General's Committee on Administrative Procedure (1940), Senate Doc. No. 10, Part 1, 77th Cong., 1st Sess.

⁵⁴ 53 Stat. 158, 26 USCA 1100.

⁵⁵ See *Colorado Nat. Bank v. Commissioner of Internal Revenue* (1938) 305 U. S. 23, 83 L. Ed. 20, 59 S. Ct. 48; *Helvering v. Rankin* (1935) 295 U. S. 123, 79 L. Ed. 1343, 55 S. Ct. 732; *Williamsport Wire Rope Co. v. United States* (1928) 277 U. S. 551, 72 L. Ed. 985, 48 S. Ct. 587. *Slayton v. Commissioner of Internal Revenue* (C. C. A. 1st, 1935) 76 F. (2d) 497, cert. den. 296 U. S. 586, 80 L. Ed. 415, 56 S. Ct. 131; *Tracy v. Commis-*

sioner of Internal Revenue (C. C. A. 6th, 1931) 53 F. (2d) 575, cert. den. 287 U. S. 632, 77 L. Ed. 548, 53 S. Ct. 83.

See also Monograph No. 22 of the Attorney General's Committee on Administrative Procedure (1940), Senate Doc. No. 10, Part 9, 77th Cong., 1st Sess.

⁵⁶ See *Williamsport Wire Rope Co. v. United States* (1928) 277 U. S. 551, 72 L. Ed. 985, 48 S. Ct. 587.

⁵⁷ 21 USCA 41-50.

⁵⁸ See *Waite v. Macy* (1918) 246 U. S. 606, 62 L. Ed. 892, 38 S. Ct. 395; *Buttfield v. Stranahan* (1904) 192 U. S. 470, 48 L. Ed. 525, 24 S. Ct. 349.

⁵⁹ 49 USCA 401-682.

Reorganization Plan No. III, § 7, and Plan No. IV, § 7(b), its functions were consolidated with functions of the Air Safety Board, and redesignated "Civil Aeronautics Board." The Administrator was redesignated "Administrator of Civil Aeronautics." These now constitute the new Civil Aeronautics Authority in the Department of Commerce.⁶⁰ It also has certain powers of enforcement under the Clayton Act.⁶¹

⁶⁰ Plan No. III. "Sec. 7. Functions of the Administrator transferred.—The functions vested in the Civil Aeronautics Authority by the Civilian Pilot Training Act of 1939 [section 751 et seq. of Title 49 of the U. S. Code]; the functions of aircraft registration and of safety regulation described in titles V and VI of the Civil Aeronautics Act of 1938 [sections 521 et seq. and 551 et seq. of Title 49], except the functions of prescribing safety standards, rules, and regulations and of suspending and revoking certificates after hearing; the function provided for by section 1101 of the Civil Aeronautics Act of 1938 [section 671 of Title 49]; and the functions of appointing such officers and employees and of authorizing such expenditures and travel as may be necessary for the performance of all functions vested in the Administrator, are transferred from the Civil Aeronautics Authority to and shall be exercised by the Administrator, who shall hereafter be known as the Administrator of Civil Aeronautics." (54 Stat. 1233, see 5 USCA 133t, note.)

Plan No. IV. "Sec. 7. Transfer of Civil Aeronautics Authority.—(a) The Civil Aeronautics Authority and its functions, the Office of the Administrator of Civil Aeronautics and its functions, and the functions of the Air Safety Board are transferred to the Department of Commerce.

"(b) The functions of the Air Safety Board are consolidated with the functions of the Civil Aeronautics

Authority, which shall hereafter be known as the Civil Aeronautics Board and which shall, in addition to its other functions, discharge the duties heretofore vested in the Air Safety Board so as to provide for the independent investigation of aircraft accidents. The offices of the members of the Air Safety Board are abolished.

"(c) The Administrator of Civil Aeronautics, whose functions shall be administered under the direction and supervision of the Secretary of Commerce, and the Civil Aeronautics Board, which shall report to Congress and the President through the Secretary of Commerce, shall constitute the Civil Aeronautics Authority within the Department of Commerce: *Provided*, That the Civil Aeronautics Board shall exercise its functions of rule-making (including the prescription of rules, regulations, and standards), adjudication, and investigation independently of the Secretary of Commerce: *Provided further*, That the budgeting, accounting, personnel, procurement, and related routine management functions of the Civil Aeronautics Board shall be performed under the direction and supervision of the Secretary of Commerce through such facilities as he shall designate or establish." (54 Stat. 1235, see 5 USCA 133t, note.)

See Monograph No. 19 of the Attorney General's Committee on Administrative Procedure (1940), Senate Doc. No. 10, Part 6, 77th Cong., 1st Sess.

⁶¹ 15 USCA 21.

§ 97. Commissioner of Immigration and Naturalization.

The Commissioner of Immigration and Naturalization was given charge of the administration of all laws relating to the immigration of aliens into the United States.⁶² Commissioners of immigration at the several ports were appointed by the President, by and with the advice and consent of the Senate, to hold their offices for the term of four years, unless sooner removed, and until their successors are appointed.⁶³ Their offices, however, were abolished and their functions directed to be administered under the supervision of the Secretary of Labor by the Commissioner of Immigration and Naturalization through district directors designated by the Commissioner.⁶⁴ Boards of special inquiry composed of three persons designated by the Commissioner with the approval of the Secretary of Labor, were given authority to determine whether an alien who had been duly held should be allowed to land or should be deported. Appeal could be had to the Secretary of Labor.⁶⁵ There were no statutory provisions for judicial review of the administrative determination, but judicial review of the Commissioner's determinations was commonly had by petition for a writ of habeas corpus.⁶⁶ The functions of the Commissioner are now administered by the Attorney General.^{66a}

§ 98. Commissioner of Internal Revenue.

The Commissioner of Internal Revenue assesses taxes, his determinations being reviewable on both the facts and the law by the Board of Tax Appeals, a revisory or appellate administrative agency.⁶⁷

⁶² 8 USCA 102. Under Section I of the President's Reorganization Plan No. V, effective June 14, 1940 (5 USCA 133t, note), the Commissioner's functions were transferred to the Department of Justice to be administered under direction of the Attorney General.

⁶³ 8 USCA 107.

⁶⁴ Reorganization Plan No. III, § 6, effective June 30, 1940, 5 USCA 133t, note.

⁶⁵ 8 USCA 153.

⁶⁶ See § 708.

^{66a} "Sec. 1. Transfer of Immigration and Naturalization Service.—The Immigration and Naturalization Service of the Department of Labor (including the Office of the Commissioner of Immigration and Naturalization)

and its functions are transferred to the Department of Justice and shall be administered under the direction and supervision of the Attorney General. All functions and powers of the Secretary of Labor relating to the administration of the Immigration and Naturalization Service and its functions or to the administration of the immigration and naturalization laws are transferred to the Attorney General. In the event of disagreement between the head of any department or agency and the Attorney General concerning the interpretation or application of any law pertaining to immigration, naturalization, or nationality, final determination shall be made by the Attorney General."

⁶⁷ See § 94.

The Commissioner also has power to grant or revoke permits for the manufacture, dealing in, or use of denatured or tax free alcohol, as an administrative agency conducting adversary proceedings subject to judicial review.⁶⁸ His power in this respect has been delegated to the Deputy Commissioner in charge of the Alcohol Tax Unit.⁶⁹

§ 99. Commodity Exchange Commission.

The Commodity Exchange Commission, established to administer the Commodity Exchange Act of 1922,⁷⁰ is composed of the Secretary of Agriculture, the Secretary of Commerce, and the Attorney General.⁷¹

§ 100. Court of Claims.

The Court of Claims is a legislative court established to determine claims against the United States, and is discussed elsewhere.⁷²

§ 101. Court of Customs and Patent Appeals.

The Court of Customs and Patent Appeals is a legislative court⁷³ set up to hear appeals from the Board of Appeals of the United States Patent Office and the United States Customs Court.⁷⁴

§ 102. Federal Alcohol Administration.

The Federal Alcohol Administration Act⁷⁵ established the Federal Alcohol Administration as a division in the Treasury Department to supervise alcoholic beverages in interstate commerce.⁷⁶ The powers, duties, records and property of the former Federal Alcohol Administrator were conferred and imposed upon the Administration.⁷⁷

⁶⁸ 26 USCA 3114. See *Morgenthau v. Mifflin Chemical Corp.* (C. C. A. 3d, 1937) 93 F. (2d) 82, rehearing denied (C. C. A. 3d, 1938) 94 F. (2d) 550. See also Monograph No. 22 of the Attorney General's Committee on Administrative Procedure (1940) Vol. 2, Senate Doc. No. 10, Part 9, 77th Cong., 1st Sess.

⁶⁹ Internal Revenue Code §§ 2871, 3114, 26 USCA 2871, 3114.

⁷⁰ 7 USCA 1-17a. See *Chicago Board of Trade v. Olsen* (1923) 262 U. S. 1, 67 L. Ed. 839, 43 S. Ct. 470.

⁷¹ See § 121.

⁷² 28 USCA 241 et seq. See § 47.

⁷³ See § 47.

⁷⁴ 28 USCA 301 et seq. *Ex parte Bakelite Corp.* (1929) 279 U. S. 438, 73 L. Ed. 789, 49 S. Ct. 411.

⁷⁵ 27 USCA 201 et seq.

⁷⁶ *William Jameson & Co. v. Morgenthau* (1939) 307 U. S. 171, 83 L. Ed. 1189, 59 S. Ct. 804. See the Monograph of the Attorney General's Committee on Administrative Procedure (1940), Senate Doc. No. 186, Part 5, 76th Cong. 3rd Sess.

⁷⁷ 27 USCA 202 a(b).

The Administration, the offices of members, and the Administrator were then abolished and their functions directed to be administered under the direction and supervision of the Secretary of the Treasury through the Bureau of Internal Revenue. This was effected by the President's Reorganization Plan of 1940, No. III, section 2, effective June 30, 1940.⁷⁸

§ 103. Federal Communications Commission.

The Federal Communications Commission, set up by the Communications Act of 1934⁷⁹ as successor to the Federal Radio Commission,⁸⁰ has jurisdiction over communications in interstate commerce, including telephones,⁸¹ and radio broadcasting.⁸²

It has the power to grant or withhold permits for the construction of stations, and to grant, deny, modify or revoke licenses to operate stations, as it finds public convenience, interest, or necessity to require. Licenses may not be issued for more than a three-year term.⁸³ It also has certain powers of enforcement under the Clayton Act.⁸⁴

§ 104. Federal Deposit Insurance Corporation.

Although a government corporation,⁸⁵ the Board of Directors of the Deposit Insurance Corporation is authorized, upon finding that an insured bank or its directors or trustees have continued unsafe or unsound practices in conducting the bank's business or otherwise violated the law, to order that the insured status of such bank be terminated.⁸⁶

⁷⁸ Sec. 2 of Reorganization Plan of 1940, No. III. "Sec. 2. Federal Alcohol Administration.—The Federal Alcohol Administration, the offices of the members thereof, and the office of the Administrator are abolished, and their functions shall be administered under the direction and supervision of the Secretary of the Treasury through the Bureau of Internal Revenue in the Department of the Treasury." (54 Stat. 1232, see 5 USCA 133t, note.)

⁷⁹ 47 USCA 35, 151 et seq.

⁸⁰ See § 106.

⁸¹ *Rochester Telephone Corp. v. United States* (1939) 307 U. S. 125, 83 L. Ed. 1147, 59 S. Ct. 754.

⁸² Federal Communications Commis-

sion v. Pottsville Broadcasting Co. (1940) 309 U. S. 134, 84 L. Ed. 656, 60 S. Ct. 437. See the Monograph of the Attorney General's Committee on Administrative Procedure (1940) Senate Doc. No. 186, Part 3, 76th Cong., 3rd Sess.

⁸³ *Federal Communications Commission v. Pottsville Broadcasting Co.* (1940) 309 U. S. 134, 84 L. Ed. 361, 60 S. Ct. 437.

⁸⁴ 15 USCA 21.

⁸⁵ See § 86.

⁸⁶ 12 USCA 264 (i) (1). See the Monograph of the Attorney General's Committee on Administrative Procedure (1940) Senate Doc. No. 186, Part 13, 76th Cong., 3rd Sess.

§ 105. Federal Power Commission.

The Federal Power Commission⁸⁷ is charged with administration of the Federal Power Act,⁸⁸ and the Natural Gas Act.⁸⁹ The Commission's powers include authority over dispositions, consolidations, and acquisitions of utility properties subject to its jurisdiction.⁹⁰

§ 106. Federal Radio Commission.

The Radio Act of 1927⁹¹ setting up the Federal Radio Commission, has been superseded by the Communications Act of 1934, setting up the Federal Communications Commission and transferring to it certain functions of the Interstate Commerce Commission and the Postmaster General.⁹²

§ 107. Federal Reserve Board.

The Federal Reserve Board is charged with administration of the Federal Reserve Act of 1916, the Banking Act of 1933, and the Banking Act of 1935.⁹³ It also has certain powers under the Clayton Act.⁹⁴ The Board has certain adjudicatory, licensing, and classification powers, under the Banking Acts, affecting private rights. Few administrative proceedings have arisen under the Act, however, due to the willingness of bankers to observe the requirements of the law, the careful scrutiny of bank examiners, and the success of ordinary supervisory processes.⁹⁵ It is not important from the standpoint of judicial review.

§ 108. Federal Tender Boards.

The Federal Tender Boards were authorized by the Act regulating interstate transportation of petroleum products,⁹⁶ under which the

⁸⁷ See Monograph No. 25 of the Attorney General's Committee on Administrative Procedure (1940) Senate Doc. No. 10, Part 12, 77th Cong., 1st Sess.

⁸⁸ 16 USCA 791a-825r.

⁸⁹ 15 USCA 717-717w.

⁹⁰ Federal Power Commission v. Pacific Power & Light Co. (1939) 307 U. S. 156, 83 L. Ed. 1180, 59 S. Ct. 766.

⁹¹ 44 Stat. 1162, formerly 47 USCA 81-119, since repealed, 47 USCA 602.

⁹² 47 USCA 151-609.

A leading administrative law case

involving the Radio Commission is Federal Radio Commission v. Nelson Bros. Bond & Mtg. Co. (1933) 289 U. S. 266, 77 L. Ed. 1166, 53 S. Ct. 627, 89 A. L. R. 406.

⁹³ 12 USCA 221 et seq.

⁹⁴ 15 USCA 21.

⁹⁵ See the Monograph of the Attorney General's Committee on Administrative Procedure (1940), Senate Doc. No. 186, Part 9, p. 25, 76th Cong., 3rd Sess.

⁹⁶ 15 USCA 715-715l, expiring June 30, 1942.

President was authorized to establish such boards for the issuance of certificates of clearance for petroleum and petroleum products moving in interstate commerce. Judicial review was obtainable in the district courts, under usual provisions.⁹⁷ By executive order No. 7756, effective December 1, 1937, the President designated and appointed the Secretary of the Interior to execute the majority of the powers and functions vested in the President and to establish therefor a Petroleum Conservatory Division in his department.⁹⁸

§ 109. Federal Trade Commission.

The Federal Trade Commission⁹⁹ was set up in 1914 to prevent the use of unfair methods of competition in interstate commerce. Not more than three of its Commissioners can be of one political party, and none may have any other calling than Commissioner. It has wide powers of investigation, and may act as a master in chancery in equity suits by the Attorney General under the Anti-Trust Acts.¹ The procedure set up by section 5 of the Federal Trade Commission Act² is prescribed in the public interest, as distinguished from provisions intended to afford remedies to private persons.³ Judicial review of its orders under the Clayton Act may be by either petition for enforcement or petition for review in a Circuit Court of Appeals,⁴ while under the Federal Trade Commission Act the Commission's order becomes final unless within sixty days from the date of service of the order upon the respondent it files in an appropriate Circuit Court of Appeals a written petition praying that the order of the Commission be set aside.⁵

§ 110. Interstate Commerce Commission.

The Interstate Commerce Commission, set up in 1887,⁶ was originally established to determine whether particular transportation rates or practices were unreasonable, unduly discriminatory or unjustly prejudicial, and to give shippers appropriate private redress therefor

⁹⁷ 15 USCA 715d (c).

⁹⁸ See 15 USCA 715j note.

⁹⁹ 15 USCA 41, 42. See the Monograph of the Attorney General's Committee on Administrative Procedure (1940), Senate Doc. No. 186, Part 6, 76th Cong., 3rd Sess.

¹ *Humphrey v. United States* (1935) 295 U. S. 602, 79 L. Ed. 1611, 55 S. Ct. 869.

² 15 USCA 45.

³ *Amalgamated Utility Workers v. Consolidated Edison Co.* (1940) 309 U. S. 261, 84 L. Ed. 738, 60 S. Ct. 561; *Federal Trade Commission v. Klesner* (1929) 280 U. S. 19, 74 L. Ed. 138, 50 S. Ct. 1.

⁴ 15 USCA 21.

⁵ 15 USCA 45.

⁶ Interstate Commerce Act, 49 USCA 1 et seq. See Monograph No. 24 of the Attorney General's Committee on

by quasi-judicial action. In 1906 the Hepburn Act⁷ gave the Commission power to prescribe future rates by quasi-legislative action meeting the standards of the Act to Regulate Commerce,⁸ which has been interpreted to include intrastate as well as interstate rates in a proper case.⁹ It is said that its jurisdiction ends where transportation ends. Where relevant, therefore, its orders must be supported by valid basic findings as to where transportation ends.¹⁰ The Commission has power to order carriers to cease giving rebates.¹¹ It has power to establish reasonable rules with respect to car service by railroad carriers,¹² which includes power to make reasonable rules as to forms and methods of accounting, reporting and distributing payments in respect of such service.¹³ The Commission has power to grant or refuse a certificate of public convenience and necessity in connection with a railroad reorganization,¹⁴ and to pass upon the reasonableness of reorganization expenses.¹⁵ The Commission has been charged with administration of the Boiler Inspection Act, providing for inspection of locomotives, their fitness for service and equipment to be used;¹⁶ the Safety Appliance Law;¹⁷ the Transportation of Ex-

Administrative Procedure (1940), Senate Doc. No. 10, Part 11, 77th Cong., 1st Sess. (1941).

⁷ Hepburn Act, 1906, Ch. 3591, 34 Stat. 584-595, 49 USCA 1, 6, 11, 14-16a 18, 20, 41.

⁸ Atlantic Coast Line R. C. v. Florida (1935) 295 U. S. 301, 79 L. Ed. 1451, 55 S. Ct. 713, rehearing denied 295 U. S. 769, 79 L. Ed. 1710, 55 S. Ct. 911; Youngstown Sheet & Tube Co. v. United States (1935) 295 U. S. 476, 79 L. Ed. 1553, 55 S. Ct. 822. See Arizona Grocery Co. v. Atchison, T. & S. F. R. Co. (1932) 284 U. S. 370, 76 L. Ed. 348, 52 S. Ct. 183.

⁹ Florida v. United States (1934) 292 U. S. 1, 78 L. Ed. 1077, 54 S. Ct. 603; United States v. Louisiana (1933) 290 U. S. 70, 78 L. Ed. 181, 54 S. Ct. 28; Louisiana Public Service Commission v. Texas & N. O. R. Co. (1931) 284 U. S. 125, 76 L. Ed. 201, 52 S. Ct. 74; Florida v. United States (1931) 282 U. S. 194, 75 L. Ed. 291, 51 S. Ct. 119; United States v. New York Cent. R. Co. (1926) 272 U. S. 457, 71 L. Ed. 350, 47 S. Ct. 130; American

Express Co. v. South Dakota ex rel. Caldwell (1917) 244 U. S. 617, 61 L. Ed. 1352, 37 S. Ct. 656.

¹⁰ Atchison, T. & S. F. R. Co. v. United States (1935) 295 U. S. 193, 79 L. Ed. 1382, 55 S. Ct. 748. See also § 564.

¹¹ 49 USCA 2, 3(1), 6(7). Baltimore & O. R. Co. v. United States (1939) 305 U. S. 507, 83 L. Ed. 318, 59 S. Ct. 284.

¹² Chicago, R. I. & P. R. Co. v. United States (1931) 284 U. S. 80, 76 L. Ed. 177, 52 S. Ct. 87; *The Assigned Car Cases (1927) 274 U. S. 564, 71 L. Ed. 1204, 47 S. Ct. 72.

¹³ Chicago, R. I. & P. R. Co. v. United States (1931) 284 U. S. 80, 76 L. Ed. 177, 52 S. Ct. 87.

¹⁴ United States v. Chicago, M., St. P. & P. R. Co. (1931) 282 U. S. 311, 75 L. Ed. 359, 51 S. Ct. 159.

¹⁵ United States v. Chicago, M., St. P. & P. R. Co. (1931) 282 U. S. 311, 75 L. Ed. 359, 51 S. Ct. 159.

¹⁶ 45 USCA 22.

¹⁷ Act of March 2, 1893, ch. 196, 27 Stat. 531, 45 USCA § 1 et seq. St.

plosives Act, involving authority to make regulations as to the transport by interstate carrier of dangerous commodities such as gasoline;¹⁸ the Motor Carrier Act of 1935 giving the Commission jurisdiction over common carriers by motor vehicle,¹⁹ and the Railway Labor Act²⁰ requiring it to determine whether or not carriers are under the jurisdiction of the Mediation Board.²¹ The Commission's duty may be merely to investigate and report facts.²² For instance, tentative and final valuations, under the Valuation Act²³ are an exercise solely of the function of investigation, and while they may be the basis of later action by the Commission, by Congress, or by the legislature or an administrative board of a state, they are not reviewable orders.²⁴ It may act in an advisory capacity, merely pointing out in its report what carriers are expected to do, instead of directing them to act.²⁵

For the most part the Interstate Commerce Commission determines matters, such as the reasonableness of rates, in which the public interest is involved. It may also determine matters which involve purely private rights, as where a shipper applies for damages for exaction by a carrier of rates found by the Commission to be unreasonable. The procedure provided by the Interstate Commerce Act with regard to unjust discrimination is wholly dissimilar, in its bearing upon private rights, from the procedure of the Federal Trade Commission in relation to unfair competition, or of the National Labor Relations Board in relation to unfair labor practices.²⁶ The Interstate Commerce Act imposes upon the carrier many duties and creates in the individual corresponding rights. For the violation of the private right it provides a private administrative remedy.²⁷ Section 16a of the Interstate Commerce Act²⁸ is coercive by design, to com-

Louis, I. M. & S. R. Co. v. Taylor (1908) 210 U. S. 281, 52 L. Ed. 1061, 28 S. Ct. 616.

¹⁸ United States v. Gulf Refining Co. (1925) 268 U. S. 542, 69 L. Ed. 1082, 45 S. Ct. 597.

¹⁹ 49 USCA 301 et seq. United States v. Maher (1939) 307 U. S. 148, 83 L. Ed. 1162, 59 S. Ct. 768, rehearing denied 307 U. S. 649, 83 L. Ed. 1528, 59 S. Ct. 831.

²⁰ 45 USCA 151 et seq.

²¹ Shields v. Utah Idaho C. R. Co. (1938) 305 U. S. 177, 83 L. Ed. 111, 59 S. Ct. 160.

²² See United States v. Atlanta, B. &

C. R. Co. (1931) 282 U. S. 522, 75 L. Ed. 513, 51 S. Ct. 237.

²³ 49 USCA 19a.

²⁴ United States v. Los Angeles & S. L. R. Co. (1927) 273 U. S. 299, 71 L. Ed. 651, 47 S. Ct. 413.

²⁵ United States v. Atlanta, B. & C. R. Co. (1931) 282 U. S. 522, 75 L. Ed. 513, 51 S. Ct. 237.

²⁶ Amalgamated Utility Workers v. Consolidated Edison Co. (1940) 309 U. S. 261, 84 L. Ed. 738, 60 S. Ct. 561.

²⁷ Amalgamated Utility Workers v. Consolidated Edison Co. (1940) 309 U. S. 261, 84 L. Ed. 738, 60 S. Ct. 561.

²⁸ 49 USCA 16a.

pel railroads to pay reparation orders, and penalizes those who unjustly delay.²⁹

The Commission also has certain powers of enforcement under the Clayton Act³⁰

§ 111. National Bituminous Coal Commission.

The National Bituminous Coal Commission, formerly established by the Bituminous Coal Act of 1937,³¹ and the offices of its members, were abolished, and its outstanding affairs directed to be wound up by the Secretary of the Interior, to whom the functions of the Commission were transferred by section 4 of the President's Reorganization Plan of 1939, No. II, effective July 1, 1939.³²

§ 112. National Labor Relations Board.

The National Labor Relations Board is charged with administration of the National Labor Relations Act of 1935,³³ and has broad powers.³⁴ It is the Board's order on behalf of the public that the court enforces.

²⁹ Baldwin v. Scott County Milling Co. (1939) 307 U. S. 478, 83 L. Ed. 1409, 59 S. Ct. 943.

³⁰ 15 USCA 21.

³¹ 15 USCA 828-851.

³² "Sec. 4. Department of the Interior.—Transfers, consolidations, and abolitions relating to the Department of the Interior are hereby effected as follows:

"(a) Functions of the National Bituminous Coal Commission transferred.—The functions of the National Bituminous Coal Commission (including the functions of the members of the Commission) are hereby transferred to the Secretary of the Interior to be administered under his direction and supervision by such division, bureau, or office in the Department of the Interior as the Secretary shall determine.

"(b) National Bituminous Coal Commission Abolished.—The National Bituminous Coal Commission and the offices of the members thereof are hereby abolished and the outstanding affairs of the Commission shall be

wound up by the Secretary of the Interior.

"(c) Office of Consumers' Counsel Abolished and Functions Transferred.—The office of Consumers' Counsel of the National Bituminous Coal Commission is hereby abolished and its functions are transferred to, and shall be administered in, the office of the Solicitor of the Department of the Interior under the direction and supervision of the Secretary of the Interior." (53 Stat. 1433, see 5 USCA 133t, note.)

See Monograph No. 23 of the Attorney General's Committee on Administrative Procedure (1940), Senate Doc. No. 10, Part 10, 77th Cong., 1st Sess. (1941).

³³ 29 USCA 151-166.

³⁴ See National Labor Relations Board v. Newport News Shipbuilding & Dry Dock Co. (1939) 308 U. S. 241, 84 L. Ed. 219, 60 S. Ct. 203; Ford Motor Co. v. National Labor Relations Board (1938) 305 U. S. 364, 83 L. Ed. 221, 59 S. Ct. 301; Consolidated Edison Co. v. National Labor Relations Board (1938) 305 U. S. 197, 83 L. Ed. 126,

The Board seeks enforcement as a public agent, not to give effect to a private administrative remedy. The proceeding is not for the adjudication of private rights. Hence there is little scope or need for the traditional rules governing the joinder of parties in litigation determining private rights.³⁵

§ 113. National Mediation Board.

The National Mediation Board, set up by a 1934 amendment to the Railway Labor Act of 1926,³⁶ mediates disputes, interprets agreements reached by mediation, and acts as arbitrator, under certain terms and conditions. It may also certify as to the duly accredited representative of employees of a railroad, and on the basis of such certification application may be made to a district court for a decree requiring the employer to negotiate with such representative.³⁷ Its powers are limited, and it may not compel arbitration.

§ 114. National Railroad Adjustment Board.

The National Railroad Adjustment Board was established by a 1934 amendment to the Railway Labor Act of 1926³⁸ to hear disputes, upon petition of either or both parties, between carriers and employees growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions. Its awards must be stated in writing and are enforceable in the courts.³⁹

59 S. Ct. 206; *Myers v. Bethlehem Shipbuilding Corp.* (1938) 303 U. S. 41, 82 L. Ed. 638, 58 S. Ct. 459; *The Labor Board Cases* (1937) 301 U. S. 1, 81 L. Ed. 893, 57 S. Ct. 615, 108 A. L. R. 1352.

See also Monograph No. 18 of the Attorney General's Committee on Administrative Procedure (1940), Senate Doc. No. 10, Part 5, 77th Cong., 1st Sess. (1941).

³⁵ *Amalgamated Utility Workers v. Consolidated Edison Co.* (1940) 309 U. S. 261, 84 L. Ed. 738, 60 S. Ct. 561; *National Licorice Co. v. National Labor Relations Board* (1940) 309 U. S. 350, 84 L. Ed. 799, 60 S. Ct. 569.

³⁶ 45 USCA 151-188. See Monograph No. 17 of the Attorney General's Committee on Administrative Procedure (1940), Senate Doc. No. 10,

Part 4, 77th Cong., 1st Sess. (1941).

³⁷ For a full discussion of the Railway Labor Act of 1926 and its predecessor statute, and of certain functions of the Mediation Board, see *Virginian Railway Co. v. System Federation No. 40*, R. E. D. (1937) 300 U. S. 515, 81 L. Ed. 789, 57 S. Ct. 592. See also *Shields v. Utah Idaho C. R. Co.* (1938) 305 U. S. 177, 83 L. Ed. 111, 59 S. Ct. 160.

³⁸ 45 USCA 153. See Monograph No. 17 of the Attorney General's Committee on Administrative Procedure (1940), Senate Doc. No. 10, Part 4, 77th Cong., 1st Sess. (1941). See also L. K. Garrison in "The National Railroad Adjustment Board: A Unique Administrative Agency," (1937) 46 *Yale L. Jour.* 567.

³⁹ 45 USCA 153 (m) and (p).

The Board does not act as a whole, power being vested in each of its four divisions. It is a bi-partisan, instead of a theoretically impartial, administrative agency, being composed of eighteen representatives of railroads and eighteen representatives of labor groups.

§ 115. Patent Office.

The Board of Appeals of the United States Patent Office is set up to hear administrative appeals respecting trade marks and patents.⁴⁰ An applicant for a patent dissatisfied with the decision of the Board of Appeals may appeal to the United States Court of Customs and Patent Appeals.⁴¹ Such an appeal resembles judicial review of an administrative order.⁴² As an alternate remedy a dissatisfied applicant may bring a bill in equity to obtain a patent, in which event the issues are tried *de novo*. These remedies are mutually exclusive.⁴³

§ 116. Postmaster-General.

The Postal Laws are administered by the Postmaster-General,⁴⁴ with power to close the mails to persons using them to defraud,⁴⁵ and to determine what publications shall be excluded from carriage as second-class mail matter.⁴⁶ There are no statutory provisions for judicial review.⁴⁷

§ 117. The President.

The earliest agency to which delegation was made was the President. Beginning in 1794, Congress authorized him, in stated circumstances to lay and revoke embargoes, etc. Later he was given the power to bring tariff duties into operation to secure reciprocity, and to adjust tariffs under the "flexible tariff provision."^{47a} Similarly, he has been empowered to determine the terms of sales of enemy property in time of war.⁴⁸ Certain powers purported to be conferred upon him were

⁴⁰ 35 USCA 57-63, 72a; 15 USCA 88, 89. See *United States ex rel. Baldwin Co. v. Robertson* (1924) 265 U. S. 168, 68 L. Ed. 962, 44 S. Ct. 508.

⁴¹ 35 USCA 59a.

⁴² 35 USCA 62.

⁴³ 35 USCA 59a, 63.

⁴⁴ See Monograph No. 13 of the Attorney General's Committee on Administrative Procedure (1940), Senate Doc. No. 10, Part 12, 77th Cong., 1st Sess. (1941).

⁴⁵ 39 USCA 258, 259. See *Leach v.*

Carlile (1922) 258 U. S. 138, 66 L. Ed. 511, 42 S. Ct. 227.

⁴⁶ See *Crowell v. Benson* (1932) 285 U. S. 22, 76 L. Ed. 598, 52 S. Ct. 285; *United States ex rel. Milwaukee Social Democratic Pub. Co. v. Burleson* (1921) 255 U. S. 407, 65 L. Ed. 704, 41 S. Ct. 352.

⁴⁷ But see *Leach v. Carlile* (1922) 258 U. S. 138, 66 L. Ed. 511, 42 S. Ct. 227. See also § 650.

^{47a} See § 27.

⁴⁸ See § 28.

held to be invalid delegations of legislative power in two recent cases of great importance.⁴⁹

§ 118. Prohibition Administrator.

Administration of the National Prohibition Act, now repealed,⁵⁰ was committed to the Commissioner of Internal Revenue. Any act authorized to be done by the Commissioner could be performed by any assistant or agent designated by him for that purpose.⁵¹ This resulted in the appointment of assistants denominated Prohibition Administrator, Prohibition Director, and Prohibition Commissioner. Their importance for purposes of administrative law lies principally in the fact that the Act conferred authority to grant and revoke permits for the manufacture and sale, transportation, etc., of intoxicating liquors, thereby giving rise to suits in the nature of judicial review testing the validity of administrative action of that character. The Commissioner was also authorized to prescribe regulations with the approval of the Secretary of the Treasury.⁵²

§ 119. Railroad Labor Board.

The Railroad Labor Board, now abolished, was established by the Transportation Act of 1920.⁵³ The purpose of this portion of the Act was to promote adjustment of disputes between carriers and their employees through conferences and decisions of the Railroad Labor Board. The Board's decisions, however, relied only on the moral sanction of public opinion and did not grant rights enforceable in a court of law.⁵⁴ The Railway Labor Act of 1926⁵⁵ repealed the aforesaid provisions of the Transportation Act and established the National Railroad Adjustment Board and the National Mediation Board.⁵⁶

§ 120. Railroad Retirement Board.

The Railroad Retirement Board is charged with administration of the Railroad Retirement Act of 1937,⁵⁷ a scheme of social security

⁴⁹ A. L. A. Schechter Poultry Corp. v. United States (1935) 295 U. S. 495, 79 L. Ed. 1570, 55 S. Ct. 837, 97 A. L. R. 947; Panama Refining Co. v. Ryan (1935) 293 U. S. 388, 79 L. Ed. 446, 55 S. Ct. 241.

⁵⁰ 41 Stat. 305, former sections 27 USCA 1-64.

⁵¹ 41 Stat. 307, former section 5, 27 USCA.

⁵² 41 Stat. 307, former section 4(7), 27 USCA. See *Campbell v. Galeno*

Chemical Co. (1930) 281 U. S. 599, 74 L. Ed. 1063, 50 S. Ct. 412.

⁵³ 41 Stat. 469, former sections 131-146, 45 USCA.

⁵⁴ See *Pennsylvania Railroad System, etc., Federation v. Pennsylvania R. Co.* (1925) 267 U. S. 203, 69 L. Ed. 574, 45 S. Ct. 307.

⁵⁵ 45 USCA 151-188.

⁵⁶ See §§ 113, 114.

⁵⁷ 45 USCA 228a et seq.

somewhat similar to that created by the Social Security Act.⁵⁸ It also administers the Railroad Unemployment Insurance Act of 1938.⁵⁹

§ 121. Secretary of Agriculture.

The Secretary of Agriculture is charged with administration, in whole or in part, of the Commodity Exchange Act of 1922,⁶⁰ the Cotton Standards Act,⁶¹ the Grain Standards Act of 1916,⁶² the Packers and Stockyards Act of 1921,⁶³ the Perishable Agricultural Commodities Act,⁶⁴ the Sugar Act of 1937,⁶⁵ the Agricultural Adjustment Act of 1938,⁶⁶ the Federal Food, Drug and Cosmetic Act,⁶⁷ and the Federal Seed Act.⁶⁸ Important administrative proceedings conducted by him have been the source of recent controversy disposed of in leading cases.⁶⁹

§ 122. Secretary of Commerce.

The Secretary of Commerce is charged with administration of laws relating to the suspension or revocation of licenses and certificates of service of mariners. The duties thereof are, however, largely administered by Marine Casualty Investigation Boards, and the Director of the Bureau of Marine Inspection and Navigation.⁷⁰ The functions of the United States Shipping Board were transferred to the Depart-

⁵⁸ See the Monograph of the Attorney General's Committee on Administrative Procedure (1940), Senate Doc. No. 186, Part 8, 76th Cong. 3rd Sess.

⁵⁹ 45 USCA 351 et seq.

⁶⁰ 7 USCA 1-17a.

⁶¹ 7 USCA 51-65.

⁶² 7 USCA 71-87. See the Monograph of the Attorney General's Committee on Administrative Procedure (1940), Senate Doc. No. 186, Part 7, 76th Cong., 3rd Sess.

⁶³ 7 USCA 181-231. See Tagg Bros. & Moorhead v. United States (1930) 280 U. S. 420, 74 L. Ed. 524, 50 S. Ct. 220; Stafford v. Wallace (1922) 258 U. S. 495, 66 L. Ed. 735, 42 S. Ct. 397, 23 A. L. R. 229. See also the Monograph of the Attorney General's Committee on Administrative Pro-

cedure (1940), Senate Doc. No. 186, Part 11, 76th Cong., 3rd Sess.

⁶⁴ 7 USCA 499a-499r.

⁶⁵ 7 USCA 1100-1183.

⁶⁶ 7 USCA 1281-1407.

⁶⁷ 21 USCA 301-392.

⁶⁸ 7 USCA 1551-1610.

⁶⁹ United States v. Morgan (1939) 307 U. S. 183, 83 L. Ed. 1211, 59 S. Ct. 795; Morgan v. United States (1938) 304 U. S. 1, 82 L. Ed. 1129, 58 S. Ct. 773, rehearing denied 304 U. S. 23, 82 L. Ed. 1135, 58 S. Ct. 999; Morgan v. United States (1936) 298 U. S. 468, 80 L. Ed. 1288, 56 S. Ct. 906.

⁷⁰ 46 USCA 239. See the Monograph of the Attorney General's Committee on Administrative Procedure (1940), Senate Doc. No. 186, Part 10, 76th Cong., 3rd Sess.

ment of Commerce under section 12 of executive order No. 6166, promulgated June 10, 1933.⁷¹

The Civil Aeronautics Authority is now within the Department of Commerce.⁷²

§ 123. Secretary of the Interior.

The Secretary of the Interior,⁷³ supervising the Commissioner of the General Land Office, under whom the Land Department functions, administers the laws regulating the disposal of the public lands.⁷⁴ He disposes of public property where Congress has provided for its sale, and has jurisdiction to transfer title and grant patents.⁷⁵ There are no statutory provisions for judicial review respecting this function, but judicial review may be had by suit to quiet title,⁷⁶ and by mandamus.⁷⁷

The Secretary also administers the Taylor Grazing Act of 1934, designed to prevent injury to public grazing lands and to provide for their orderly use.⁷⁸ And he exercises certain adjudicatory functions relating to the administration of the affairs of deceased Indians.⁷⁹

Since July 1, 1939, when the National Bituminous Coal Commission was abolished by the President's Reorganization Plan, No. II,⁸⁰ the Bituminous Coal Act of 1937⁸¹ has been administered by the Director of the Bituminous Coal Division responsible to the Secretary of the Interior.⁸²

§ 124. Secretary of Labor.

The Secretary of Labor is charged with the determination of minimum wages payable for work on public contracts under the Walsh

⁷¹ 47 Stat. 413, 5 USCA 124-132 note. See *Swayne & Hoyt, Ltd. v. United States* (1937) 300 U. S. 297, 81 L. Ed. 659, 57 S. Ct. 478; *Isbrandtsen-Moller Co. v. United States* (1937) 300 U. S. 139, 81 L. Ed. 562, 57 S. Ct. 407.

⁷² See § 96.

⁷³ See Monograph No. 20 of the Attorney General's Committee on Administrative Procedure (1940), Senate Doc. No. 10, Part 7, 77th Cong., 1st Sess. (1941).

⁷⁴ 43 USCA 1 et seq. See *West v. Standard Oil Co.* (1929) 278 U. S. 200, 73 L. Ed. 265, 49 S. Ct. 138;

Plested v. Abbey (1913) 228 U. S. 42, 57 L. Ed. 724, 33 S. Ct. 503.

⁷⁵ See *Crowell v. Benson* (1932) 285 U. S. 22, 76 L. Ed. 598, 52 S. Ct. 285.

⁷⁶ See § 248.

⁷⁷ See § 688 et seq.

⁷⁸ 43 USCA 315-315p.

⁷⁹ 25 USCA 371 et seq.

⁸⁰ 53 Stat. 1433, 5 USCA 133t, note, § 4 (a) (b).

⁸¹ 15 USCA 828-851.

⁸² See Monograph No. 23 of the Attorney General's Committee on Administrative Procedure (1940), Senate Doc. No. 10, Part 10, 77th Cong., 1st Sess. (1941).

Healey Act.⁸³ On complaint of violation of the Act, the Secretary is authorized to designate an impartial representative to hold hearings, issue orders requiring testimony under oath, make findings of fact conclusive upon all agencies of the United States, and if supported by the "preponderance" of the evidence, conclusive in any court of the United States; and to make such decisions, based upon findings of fact, as are deemed to be necessary to enforce the provisions of the Act. Accordingly the Secretary has established within the Department of Labor, a Division of Public Contracts, headed by an Administrator immediately and solely answerable to the Secretary. Respecting violations of the Act, the Administrator's decision is operative as the final order of the Department of Labor in the absence of an appeal to the Secretary.⁸⁴

A Public Contracts Board has been established within the Department, subordinate to the Administrator, to make, for the consideration of the Secretary, determinations as to prevailing minimum wages. The minimum wage provision, however, was not intended to confer legal rights upon those desirous of selling to the government, but is a self-imposed restraint for violation of which the government, but not private litigants, can complain. Private litigants thus have no legal standing to assail determinations as to minimum wages, and no right to judicial review thereof.⁸⁵

Administration of the Fair Labor Standards Act of 1938 is performed by the Administrator of the Wage and Hour Division of the Department of Labor.⁸⁶

§ 125. Secretary of the Treasury.

The Secretary of the Treasury has been delegated the power to establish standards of quality for imports,⁸⁷ and extensive powers under various Revenue Acts.

§ 126. Secretary of War.

In addition to his many military functions and duties the Secretary of War administers certain laws affecting civilian private rights, chiefly in connection with the use of navigable waters.⁸⁸ He admin-

⁸³ 41 USCA 35 et seq.

⁸⁴ See the Monograph of the Attorney General's Committee on Administrative Procedure dealing with the Walsh Healey Act (1940) Senate Doc. No. 186, Part 1, 76th Cong., 3rd Sess.

⁸⁵ See *Perkins v. Lukens Steel Co.* (1940) 310 U. S. 113, 84 L. Ed. 1108, 60 S. Ct. 869.

⁸⁶ See § 93.

⁸⁷ See § 30.

⁸⁸ See Monograph No. 15 of the Attorney General's Committee on Ad-

isters the Rivers and Harbors Act of 1899⁸⁹ and the Bridge Act of 1906,⁹⁰ relating to the construction of bridges, dams, dikes, or causeways over navigable waters, and the alteration thereof in the interests of reasonably free, easy and unobstructed navigation. He is also authorized to determine reasonable tolls for the use of bridges over navigable waters.⁹¹

§ 127. Securities and Exchange Commission.

The Securities and Exchange Commission⁹² is charged with administration of the Securities Act of 1933,⁹³ the Securities Exchange Act of 1934,⁹⁴ the Public Utility Holding Company Act of 1935,⁹⁵ the Trust Indenture Act of 1939,⁹⁶ the Investment Company Act of 1940⁹⁷ and the Investment Advisers Act of 1940.⁹⁸

§ 128. Selective Service System Boards.

Under the Selective Training and Service Act of 1940⁹⁹ the President is authorized to create and establish a selective service system, and therein civilian local boards and such other civilian agencies, including appeal boards and agencies of appeal, as may be necessary to carry out the provisions of the Act. There is no provision for judicial review.

§ 129. Social Security Board: Federal Security Agency.

The Social Security Board is charged with administration of the Social Security Act under the direction and supervision of the Federal Security Administrator.¹ It and its functions have been consolidated with other agencies under the Federal Security Agency pursuant to sections 201-203 of the President's Reorganization Plan of 1939, No. 1, effective July 1, 1939.²

ministrative Procedure (1940), Senate Doc. 10, Part 2, 77th Cong., 1st Sess. (1941).

⁸⁹ 33 USCA 401 et seq.

⁹⁰ See 33 USCA 491-502.

⁹¹ 33 USCA 503-507.

⁹² See Monograph No. 26 of the Attorney General's Committee on Administrative Procedure (1940), Senate Doc. 10, Part 13, 77th Cong., 1st Sess. (1941).

⁹³ 15 USCA 77a-77aa.

⁹⁴ 15 USCA 78a-78jj.

⁹⁵ 15 USCA 79 to 79z-6.

⁹⁶ 15 USCA 77aaa-77bbbb.

⁹⁷ 15 USCA 80a-1 through 80a-52.

⁹⁸ 15 USCA 80b-1 through 80b-21.

⁹⁹ 50 USCA (App.) 301-318.

142 USCA 901a. See Monograph No. 16 of the Attorney General's Committee on Administrative Procedure (1940), Senate Doc. No. 10, Part 3, 77th Cong., 1st Sess. (1941).

² "Sec. 201. Federal Security Agency.—(a) The United States Employment Service in the Department of Labor and its functions and personnel are transferred from the Depart-

§ 130. United States Customs Court.

The United States Customs Court determines controversies between an importing taxpayer and the government concerning the amount of duty to be paid on specified articles.³ It was formerly known as the Board of General Appraisers, the change being one in name only.⁴ Appeals from its determinations lie to the Court of Customs and Patent Appeals.⁵

§ 131. United States Employees' Compensation Commission: Deputy Commissioners.

The United States Employees' Compensation Commission, created in 1916⁶ administers the Longshoremen's and Harbor Workers' Com-

ment of Labor; the Office of Education in the Department of the Interior and its functions and personnel (including the Commissioner of Education) are transferred from the Department of the Interior; the Public Health Service in the Department of the Treasury and its functions and personnel (including the Surgeon General of the Public Health Service) are transferred from the Department of Treasury; the National Youth Administration within the Works Progress Administration and its functions and personnel (including its Administrator) are transferred from the Works Progress Administration; and these agencies and their functions, together with the Social Security Board and its functions, and the Civilian Conservation Corps and its functions, are hereby consolidated under one agency to be known as the Federal Security Agency, with a Federal Security Administrator at the head thereof. The Federal Security Administrator shall be appointed by the President, by and with the advice and consent of the Senate, and shall receive a salary at the rate of \$12,000 per annum. He shall have general direction and supervision over the administration of the several agencies consolidated into the Federal Security Agency by this section and shall be responsible for the coordination of

their functions and activities.

"(b) The Federal Security Administration shall appoint an Assistant Federal Security Administrator, who shall receive a salary at the rate of \$9,000 per annum, and he may also appoint such other personnel and make such expenditures as may be necessary.

"(c) The Assistant Administrator shall act as Administrator during the absence or disability of the Administrator or in the event of a vacancy in that office and shall perform such other duties as the Administrator shall direct.

"(d) The several agencies and functions consolidated by this section into the Federal Security Agency shall carry with them their personnel.

"Sec. 202. Social Security Board.—The Social Security Board and its functions shall be administered as a part of the Federal Security Agency under the direction and supervision of the Federal Security Administrator. The Chairman of the Social Security Board shall perform such administrative duties as the Federal Security Administrator shall direct." (53 Stat. 1424, see note, 5 USCA 133t note.)

³ 19 USCA 1518.

⁴ Act of May 27, 1926, 44 Stat. 669.

⁵ See § 101.

⁶ Act of September 7, 1916, ch. 458,

pensation Act.⁷ The Act deals exclusively with compensation in respect of disability or death resulting from an injury occurring upon the navigable waters of the United States, if recovery through workmen's compensation proceedings may not validly be provided by state law, and if the relation of master and servant exists. It imposes liability irrespective of fault. The jurisdictional questions whether the injury occurred upon navigable waters, and whether the master-servant relation existed are ultimately for the court to decide in a trial *de novo*, as the constitutional power of Congress itself over the subject matter depends upon these facts.⁸ Congress has the power to leave other issues to administrative determination, and such findings are conclusive if supported by evidence.⁹ The Act applies also as a workmen's compensation act for injuries to employees in the District of Columbia.¹⁰ The Commission also determines claims for compensation by employees of the United States¹¹ and by the emergency or relief workers of the government in the Federal Civil Works Administration.¹²

§ 132. United States Maritime Commission.

The United States Maritime Commission was established by the Merchant Marine Act of 1936,¹³ taking over all money, notes, bonds, mortgages, securities, contracts, lands, vessels, docks, etc., and property of every kind owned by the United States and controlled by the Department of Commerce as the successor to the powers and functions of the former United States Shipping Board, by virtue of the President's executive order of June 10, 1933.¹⁴ This includes all the func-

39 Stat. 748, 5 USCA 778. See Monograph No. 21 of the Attorney General's Committee on Administrative Procedure (1940), Senate Doc. No. 10, Part 8, 77th Cong., 1st Sess. (1941).

⁷ Act of March 4, 1927, ch. 509, 44 Stat. 1424, 33 USCA 901-950.

⁸ *Crowell v. Benson* (1932) 285 U. S. 22, 76 L. Ed. 598, 52 S. Ct. 285. See also § 262 et seq.

⁹ *South Chicago Coal & Dock Co. v. Bassett* (C. C. A. 7th, 1939) 104 F. (2d) 522, aff'd 309 U. S. 251, 84 L. Ed. 732, 60 S. Ct. 544. See § 575 et seq.

¹⁰ Act of June 15, 1938, ch. 392, 52 Stat. 689. See *Del Vecchio v. Bowers* (1935) 296 U. S. 280, 80 L. Ed. 229, 56 S. Ct. 190.

¹¹ 5 USCA 751-795.

¹² 5 USCA 796.

¹³ 46 USCA 1101-1279. See the Monograph of the Attorney General's Committee on Administrative Procedure (1940), Senate Doc. No. 186, Part 4, 76th Cong., 3rd Sess.

¹⁴ 46 USCA 1112, 1114.

“§ 1114. Transfer of powers; rules and orders

“(a) Transfer of powers and duties of Shipping Board. All the functions, powers, and duties vested in the former United States Shipping Board by sections 801 to 891x of this title, and prior to June 29, 1936, vested in the Department of Commerce pursuant to section 12 of the President's Executive order of June 10, 1933, are hereby transferred to the United

tions, powers and duties vested in the former United States Shipping Board by the Shipping Act of 1916,¹⁵ the Merchant Marine Act of 1920,¹⁶ the Merchant Marine Act of 1928,¹⁷ and the Intercoastal Shipping Act of 1933.¹⁸

§ 133. United States Shipping Board.

After the passage of the Merchant Marine Act of 1920,¹⁹ the United States Shipping Board had the power and duty to settle and adjust claims arising from contracts made and cancelled by the Fleet Corporation.²⁰ It performed its principal functions through the Emergency Fleet Corporation, which was an "agency" as opposed to a bureau or division, of the Shipping Board.²¹ Both the authority conferred on the Shipping Board and the Act prescribing the mode of its exercise, closely parallel those of the Interstate Commerce Act.²²

Before the enactment of the Shipping Act of 1916,²³ there was no congressional regulation of rates and practices of water carriers. Under that Act water carriers were required only to file maximum

States Maritime Commission: Provided, however, That after June 29, 1936 no further construction loans shall be made under the provisions of section 870 of this title.

"(b) Rules and regulations; transfer of functions to Interstate Commerce Commission. The Commission is hereby authorized to adopt all necessary rules and regulations to carry out the powers, duties, and functions vested in it by this chapter. As amended June 23, 1938, c. 600, § 41, 52 Stat. 964.

"(c) Enforcement of orders; penalties for violations. The orders issued by the United States Maritime Commission in the exercise of the powers transferred to it by this subchapter shall be enforced in the same manner as heretofore provided by law for enforcement of the orders issued by the former United States Shipping Board, and violation of such orders shall subject the person or corporation guilty of such violation to the same penalties or punishment as heretofore provided for violation of the orders of said Board. (June 29, 1936, c. 853,

Title II, § 204, 49 Stat. 1987, as amended June 23, 1938, c. 600, § 41, 52 Stat. 964.)"

15 46 USCA 801-841.

16 46 USCA 861-889.

17 46 USCA 891-891y. See also 46 USCA 1243.

18 46 USCA 843-848.

19 46 USCA 862.

20 United States ex rel. Skinner & Eddy Corp. v. McCarl (1927) 275 U. S. 1, 72 L. Ed. 131, 48 S. Ct. 12.

21 United States Emergency Fleet Corp. v. Western Union Telegraph Co. (1928) 275 U. S. 415, 72 L. Ed. 345, 48 S. Ct. 198.

22 Inter-Island Steam Navigation Co., Ltd. v. Hawaii by Public Utilities Commission (1938) 305 U. S. 306, 83 L. Ed. 189, 59 S. Ct. 202; Swayne & Hoyt, Ltd. v. United States (1937) 300 U. S. 297, 81 L. Ed. 659, 57 S. Ct. 478; United States Navigation Co., Inc. v. Cunard Steamship Co., Ltd. (1932) 284 U. S. 474, 76 L. Ed. 408, 52 S. Ct. 247.

23 39 Stat. 728, 46 USCA 801-842, 1101.

rates,²⁴ which left them free to indulge in rate wars.²⁵ Under the Intercoastal Shipping Act of 1933²⁶ they were required to file schedules specifying their rates, which could be examined by the Board as to their lawfulness.²⁷

The functions of the Shipping Board were transferred to the Department of Commerce by section 12 of the Reorganization Act of 1932, and the President's executive order of June 10, 1933, and the Shipping Board was abolished.²⁸ Its functions, powers and duties, and its property were later taken over by the United States Maritime Commission.²⁹

§ 134. United States Tariff Commission.

The Tariff Commission is a fact-finding administrative agency charged with the duty of investigating various aspects of the customs laws, and tariff relations and reporting thereon to the President, the Congress, and other administrative agencies. It is not empowered to make orders directing the application of any statutory mandate, such being the President's function.³⁰

§ 135. Veterans' Administration.^{30a}

In 1930, by executive order No. 5398, the various governmental activities affecting veterans, to wit, the Bureau of Pensions, the United States Veterans' Bureau, and the National Home for Disabled Volunteer Soldiers, were consolidated in an independent administrative agency known as the Veterans' Administration and headed by the Administrator of Veterans' Affairs.³¹ Broad power of delegation of authority has been vested in the Administrator, and accordingly various adjudicatory boards have been set up within the Administration.³² The Administrator's appellate duties have been in the main delegated to the Board of Veterans' Appeals.

²⁴ 46 USCA 817.

²⁵ See *Swayne & Hoyt, Ltd. v. United States* (1937) 300 U. S. 297, 81 L. Ed. 659, 57 S. Ct. 478.

²⁶ 46 USCA 844, 845.

²⁷ See *Swayne & Hoyt, Ltd. v. United States* (1937) 300 U. S. 297, 81 L. Ed. 659, 57 S. Ct. 478.

²⁸ Executive Order No. 6166, Section 12, June 10, 1933, 5 USCA 124-132 note. See *Swayne & Hoyt, Ltd. v. United States* (1937) 300 U. S. 297, 81 L. Ed. 659, 57 S. Ct. 478; *Isbrandtsen-*

Moller Co. v. United States (1937) 300 U. S. 139, 81 L. Ed. 562, 57 S. Ct. 407.

²⁹ See § 132.

³⁰ 19 USCA 1330-1341. See Monograph No. 27 of the Attorney General's Committee on Administrative Procedure (1940) Vol. 1; Senate Doc. No. 10, Part 14, 77th Cong., 1st Sess. (1941).

^{30a} See § 92.

³¹ 38 USCA 11 et seq.

³² See the Monograph of the Attorney General's Committee of Adminis-

Pensions, however, are the bounties of government, which Congress has the right to give, withhold, distribute or recall at its discretion. No pensioner has a vested legal right to his pension, and judicial review has been expressly precluded,³³ except on war risk insurance policies which do involve legal rights.³⁴

VI. STATE AGENCIES

§ 136. In General.

There are many administrative agencies in the state governmental systems, equipped to handle problems of state administration. These go by various titles, which often do not indicate the full scope of the agency's jurisdiction, and of which the following are samples: Board of Public Utilities Commissioners,³⁵ Department of Public Works,³⁶ Public Service Commission,³⁷ Railroad Commission,³⁸ Superintendent of Insurance,³⁹ and others.⁴⁰

§ 137. Federal Requirements.

In the main the validity of a determination of a state administrative agency depends upon the State Constitution, laws and decisions.⁴¹ Yet it is also subject to the requirements of the Federal Constitution, so that federal questions involved are necessarily for ultimate decision by the United States Supreme Court. A state cannot give its commissions power to do what the laws of the United States forbid, whether they call their action administrative or judicial.⁴² These

trative Procedure (1940), Senate Doc. No. 186, Part 2, 76th Cong., 3rd Sess.

³³ 38 USCA 705 (section 5 of the Economy Act of 1933). See *United States ex rel. Burnett v. Teller* (1882) 107 U. S. 64, 27 L. Ed. 352, 2 S. Ct. 39.

³⁴ See *Lynch v. United States* (1934) 292 U. S. 571, 78 L. Ed. 1434, 54 S. Ct. 840.

³⁵ *Erie R. Co. v. Public Utility Commissioners* (1921) 254 U. S. 394, 65 L. Ed. 322, 41 S. Ct. 169.

³⁶ *Northern P. R. Co. v. Department of Public Works* (1925) 268 U. S. 39, 69 L. Ed. 836, 45 S. Ct. 412.

³⁷ *St. Louis & S. F. R. Co. v. Public Service Commission* (1921) 254 U. S. 535, 65 L. Ed. 389, 41 S. Ct. 192;

Pennsylvania R. Co. v. Public Service Commission (1919) 250 U. S. 566, 63 L. Ed. 1142, 40 S. Ct. 36.

³⁸ *Railroad Commission of Calif. v. Los Angeles R. Corp.* (1929) 280 U. S. 145, 74 L. Ed. 234, 50 S. Ct. 71.

³⁹ *Aetna Ins. Co. v. Hyde* (1928) 275 U. S. 440, 72 L. Ed. 357, 48 S. Ct. 174.

⁴⁰ A more complete list of various state administrative agencies may be obtained by inspection of the table of cases.

⁴¹ *Denney v. Pacific Telephone & Telegraph Co.* (1928) 276 U. S. 97, 72 L. Ed. 483, 48 S. Ct. 223.

⁴² *Pennsylvania R. Co. v. Public Service Commission* (1919) 250 U. S. 566, 63 L. Ed. 1142, 40 S. Ct. 36. See

federal questions consist only of the questions arising under the Constitution of the United States, such as denial of procedural due process⁴³ confiscation or other deprivation of property without due process of law⁴⁴ denial of the equal protection of the laws,⁴⁵ interference with the rights of free speech and a free press,⁴⁶ and whether state administrative action has unduly burdened interstate commerce⁴⁷ impaired the obligation of contracts,⁴⁸ or is otherwise arbitrary.⁴⁹

State decisions reviewing state administrative determinations being thus reviewable in the federal courts on federal questions,⁵⁰ ultimate review by the Supreme Court has resulted in a certain degree of uniformity in state administrative procedure. This is due to the fundamental and pervasive character of such federal questions as procedural due process and confiscation.

Regulation of a utility's rates is an exercise of the state's police power, and hence in a proper case a state agency may alter rates fixed by contract between private parties.⁵¹ But where rates have been established by contract between the utility and the municipality it serves, as in a franchise, the municipality or its successor has no power to alter the rates fixed by contract.⁵²

Federal constitutional requirements prevent a state agency from regulating interstate commerce where Congress has empowered a federal agency to do so, and such agency has taken action.⁵³

Where a federal statute gives a federal judicial remedy against a federal agency, it must be used. The federal right cannot be asserted in a state proceeding which is concerned with separate and purely intrastate aspects of the transaction in question. Thus, where the Interstate Commerce Act provides for a remedy in the federal courts against extensions in interstate commerce for which the Commission has issued no certificate of convenience and necessity,⁵⁴ the objection of lack of certificate cannot be raised in a state agency proceeding to fix

Gulf, C. & S. F. R. Co. v. Texas (1918)
246 U. S. 58, 62 L. Ed. 574, 38 S. Ct.
236.

⁴³ See § 274 et seq.

⁴⁴ See § 323 et seq.

⁴⁵ See § 401 et seq.

⁴⁶ See § 422.

⁴⁷ See § 420.

⁴⁸ See § 421.

⁴⁹ See § 596 et seq.

⁵⁰ See § 650 et seq.

⁵¹ Union Dry Goods Co. v. Georgia
Public Service Corp. (1919) 248 U. S.
372, 63 L. Ed. 309, 39 S. Ct. 117, 9
A. L. R. 1420.

⁵² Detroit United R. Co. v. Detroit
(1919) 248 U. S. 429, 63 L. Ed. 341,
39 S. Ct. 151.

⁵³ Pennsylvania R. Co. v. Public
Service Commission (1919) 250 U. S.
566, 63 L. Ed. 1142, 40 S. Ct. 36.

⁵⁴ 49 USCA 1, par. 20.

the place and manner in which the proposed local track is to cross another track.⁵⁵

§ 138. Exercise of Police Power by State Agencies.

In the exercise of the police power by state agencies a broad field is open for regulation. They may establish reasonable rates for intrastate commerce,⁵⁶ prevent discrimination in service between profitable and less profitable territories,⁵⁷ require a utility to continue to use existing facilities to supply a present need⁵⁸ or to make reasonable extensions of its service in order to satisfy a new or increased demand, present or anticipated.⁵⁹ Thus, a railroad may be compelled to establish a physical connection with another railroad for the interchange of cars in intrastate commerce.⁶⁰

§ 139. Compensation Commissions.

State compensation commissions perform functions similar to those of the federal commission.⁶¹

⁵⁵ St. Louis Southwestern R. Co. v. Missouri Pac. R. Co. (1933) 289 U. S. 76, 77 L. Ed. 1042, 53 S. Ct. 516.

⁵⁶ *The Minnesota Rate Cases (1913) 230 U. S. 352, 57 L. Ed. 1511, 33 S. Ct. 729.

⁵⁷ United Fuel Gas Co. v. Railroad Commission (1929) 278 U. S. 300, 73 L. Ed. 390, 49 S. Ct. 150.

⁵⁸ United Fuel Gas Co. v. Railroad Commission (1929) 278 U. S. 300, 73 L. Ed. 390, 49 S. Ct. 150.

⁵⁹ United Fuel Gas Co. v. Railroad Commission (1929) 278 U. S. 300, 73 L. Ed. 390, 49 S. Ct. 150.

⁶⁰ Michigan Cent. R. Co. v. Michigan Railroad Commission (1915) 236 U. S. 615, 59 L. Ed. 750, 35 S. Ct. 422.

⁶¹ See Minnie v. Port Huron Terminal Co. (1934) 295 U. S. 647, 79 L. Ed. 1631, 55 S. Ct. 884.

CHAPTER 4

RELATIONSHIP OF ADMINISTRATIVE AGENCIES TO THE LEGISLATURE

§ 140. In General.

To the extent that agencies exercise powers delegated by the legislature, they are administrative arms of the legislature and charged with the policy of the law.

But the fact that they are administrative arms of the legislature does not mean, under the separation of powers, that they may perform purely executive functions so as to encroach upon the constitutional powers of the executive. Such executive acts may not be performed by the legislature directly, or indirectly through its agents.¹

¹ Springer v. Philippine Islands 48 S. Ct. 480; 39 Op. Atty. Gen. 10 (1928) 277 U. S. 189, 72 L. Ed. 845, (1937); 37 Op. Atty. Gen. 56 (1933).

CHAPTER 5

RELATIONSHIP OF ADMINISTRATIVE AGENCIES TO THE EXECUTIVE

§ 141. In General.

Administrative agencies may include the President or executive officers who have separate duties within the executive branch of the government.¹ And as a general concept administrative agencies fall within the executive department even though their administrative work is the completion of a legislative process.² The President may remove at his pleasure officers who exercise purely executive functions.³ But since administrative agencies are delegates of the legislature, the doctrine of separation of powers⁴ requires that, so far as

¹ See § 82 et seq.

² See *Isbrandtsen-Moller Co., Inc. v. United States* (1937) 300 U. S. 139, 81 L. Ed. 562, 57 S. Ct. 407.

³ "The vesting of the executive power in the President was essentially a grant of the power to execute the laws. But the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates. This view has since been repeatedly affirmed by this Court. *Wilcox v. Jackson*, 13 Peters 498, 513; *United States v. Eliason*, 16 Peters 291, 302; *Williams v. United States*, 1. How. 290, 297; *Cunningham v. Neagle*, 135 U. S. 1, 63; *Russell Co. v. United States*, 261 U. S. 514, 523. As he is charged specifically to take care that they be faithfully executed, the reasonable implication, even in the absence of express words, was that as part of his executive power he should select those who were to act for him under his direction in the execution of the laws. The further implication must be, in the ab-

sence of any express limitation respecting removals, that as his selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he can not continue to be responsible. *Fisher Ames*, 1 *Annals of Congress*, 474. It was urged that the natural meaning of the term 'executive power' granted the President included the appointment and removal of executive subordinates. If such appointments and removals were not an exercise of the executive power, what were they? They certainly were not the exercise of legislative or judicial power in government as usually understood." (Mr. Chief Justice Taft in *Myers v. United States* (1926) 272 U. S. 52, 117, 118, 71 L. Ed. 160, 47 S. Ct. 21.)

See Joseph P. Chamberlain in "Democratic Control of Administration," (1927) 13 *Am. Bar Ass'n Jour.* 186.

⁴ See § 3.

the exercise of legislative powers is concerned, the delegate be independent of the other branches of government, although subject to judicial review. Otherwise the ends sought by the legislation might be thwarted. A legislative agency should be independent of the executive, lest executive control frustrate the ends of Congress in setting up the agency. Therefore, when Congress fixes the term of agency members, though they are appointed by the President, he has no power of removal, such as he has over executive officers, except for the causes specified in the statute.⁵ Thus, where the Federal Trade Commission Act, section 6,⁶ provides that commissioners shall be appointed by the President for seven years, subject to removal for inefficiency, neglect of duty, or malfeasance in office, the executive can remove for no other cause, such as a desire for "personnel of my selection" and a feeling "that your mind and mine" do not "go along together."⁷ Not only does the work of such an agency require experience, so that tenure should be long enough to acquire such experience, but such a commission is separate and apart from any existing part of the government. Its purpose is to effect legislative policies embodied in the statute in accordance with the legislative standard prescribed. It must be free from executive control. In administering the provisions of the statute in respect of "unfair methods of competition"—that is to say in filling in and administering the details embodied in that general standard the commission acts quasi-legislatively and quasi-judicially. The power of removal possessed by the President over executive officers is inapplicable to such an agency.⁸

⁵ "The result of what we now have said is this: Whether the power of the President to remove an officer shall prevail over the authority of Congress to condition the power by fixing a definite term and precluding a removal except for cause, will depend upon the character of the office; the Myers decision, affirming the power of the President alone to make the removal, is confined to purely executive officers; and as to officers of the kind here under consideration, we hold that no removal can be made during the prescribed term for which the officer is appointed, except for one or more of the causes named in the applicable

statute." (Mr. Justice Sutherland in *Humphrey v. United States* (1935) 295 U. S. 602, 631, 632, 79 L. Ed. 1611, 55 S. Ct. 869.)

⁶ 15 USCA 41, 42.

⁷ *Humphrey v. United States* (1935) 295 U. S. 602, 79 L. Ed. 1611, 55 S. Ct. 869.

⁸ "The officer of a postmaster is so essentially unlike the office now involved that the decision in the Myers case cannot be accepted as controlling our decision here. A postmaster is an executive officer restricted to the performance of executive functions. He is charged with no duty at all related to either the

Conversely, an agency acting as the administrative arm of the legislature may not perform purely executive functions so as to encroach upon the constitutional power of the executive.^{8a}

legislative or judicial power. The actual decision in the Myers case finds support in the theory that such an officer is merely one of the units in the executive department and, hence, inherently subject to the exclusive and illimitable power of removal by the Chief Executive, whose subordinate and aid he is. Putting aside dicta, which may be followed if sufficiently persuasive but which are not controlling, the necessary reach of the decision goes far enough to include all purely executive officers. It goes no farther;—much less does it

include an officer who occupies no place in the executive department and who exercises no part of the executive power vested by the Constitution in the President.” (Mr. Justice Sutherland in *Humphrey v. United States* (1935) 295 U. S. 602, 627, 628, 79 L. Ed. 1611, 55 S. Ct. 869.)

See William J. Donovan and Ralston R. Irvine in “The President’s Power to Remove Members of Administrative Agencies,” (1936) 21 *Corn. L. Q.* 215.

^{8a} See § 140.

CHAPTER 6

RELATION OF ADMINISTRATIVE AGENCIES TO THE JUDICIARY

§ 142. Introduction.

§ 143. Administrative Agencies Compared to Fact-Finding Agencies in Judicial Proceedings.

§ 144. Courts and Agencies Are Interdependent and Coordinate.

§ 145. Agency Not Comparable to Lower Court.

§ 146. Some Differences Between Courts and Agencies.

§ 142. Introduction.

Administrative action is subject to judicial review in accordance with the traditional criteria for exercise of the judicial power.¹ Yet agencies are coordinate and interdependent with the courts which may judicially review their action, and are comparable to fact-finding agencies in judicial proceedings.² An agency is not comparable to a lower court.³

§ 143. Administrative Agencies Compared to Fact-Finding Agencies in Judicial Proceedings.

An administrative agency is primarily a legislative fact-finding body, acting to complete a legislative process.⁴ Juries, special masters or referees, commissioners or assessors, and judges of equity or law courts, may act as fact-finding bodies in judicial proceedings to aid in completion of the judicial process. Adversary proceedings of administrative agencies are quasi-judicial in character and are comparable to adversary judicial proceedings. For instance, the legal validity of an administrative determination of fact ^{4a} is governed by the same general rule which is applicable to like determinations within judicial

¹ See § 41 et seq.

² See § 143.

³ See § 145.

⁴ *Louisville & N. R. Co. v. Garrett*
(1913) 231 U. S. 298, 58 L. Ed. 229,
34 S. Ct. 48. See § 66 et seq.

^{4a} See § 505 et seq.

cognizance made by juries,⁵ special masters or referees,⁶ commissioners or assessors,⁷ and district judges sitting at law without a jury.^{7a} While the reports of masters and commissioners in equity and admiralty are essentially of an advisory nature, it has not been the

⁵ Interstate Commerce Commission.

* See *Great Northern R. Co. v. Merchants Elevator Co.* (1922) 259 U. S. 285, 66 L. Ed. 943, 42 S. Ct. 477.

National Labor Relations Board.

National Labor Relations Board v. Columbian Enameling & Stamping Co. (1939) 306 U. S. 292, 83 L. Ed. 660, 59 S. Ct. 501; *National Labor Relations Board v. Botany Worsted Mills, Inc.* (C. C. A. 3rd, 1939) 106 F. (2d) 263. **Secretary of Agriculture.**

Brandeis, J., dissenting in *St. Joseph Stock Yards Co. v. United States* (1936) 298 U. S. 38, 80 L. Ed. 1033, 56 S. Ct. 720.

Workmen's Compensation Cases.

Crowell v. Benson (1932) 285 U. S. 22, 76 L. Ed. 598, 52 S. Ct. 285.

⁶ *Crowell v. Benson* (1932) 285 U. S. 22, 76 L. Ed. 598, 52 S. Ct. 285; *Pacific Live Stock Co. v. Lewis* (1916) 241 U. S. 440, 60 L. Ed. 1034, 36 S. Ct. 637.

The Federal Trade Commission, by statute, may act as master in chancery in anti-trust suits brought by the Attorney General, 15 USCA 41 et seq., *Humphrey v. United States* (1935) 295 U. S. 602, 79 L. Ed. 1611, 55 S. Ct. 869.

⁷ *Crowell v. Benson* (1932) 285 U. S. 22, 76 L. Ed. 598, 52 S. Ct. 285.

^{7a} Prior to the advent of the Rules of Civil Procedure, the findings of a judge sitting at law without a jury were reviewable only on questions of law, of which the major question was whether there was legally sufficient evidence in the record to support the findings. *Maryland Casualty Co. v. Jones* (1929) 279 U. S. 792, 73 L. Ed. 960, 49 S. Ct. 484; *Mercantile Mutual Ins. Co. v. Folsom* (1873) 18 Wall. (85

U. S.) 237, 21 L. Ed. 827; and see ante, chapter 52; *Keystone Steel & Wire Co. v. Kokomo Steel & Wire Co.* (C. C. A. 7th, 1924) 1 F. (2d) 790; *City of Cleveland v. Walsh Const. Co.* (C. C. A. 6th, 1922) 279 Fed. 57. This rule was changed by Rule 52-a of the Rules of Civil Procedure so that now findings of a judge sitting without a jury (at law or in equity) "shall not be set aside unless clearly erroneous." This accords with the old rule as to the scope of review of findings of judges in equity cases, which was a definitely broader scope of review.

"[1-3] As this is an appeal in equity, we are not bound by the trial judge's findings of fact, as we would be upon a writ of error; but the rule is well settled that, as he has seen and heard the witnesses, his findings ought not be disturbed unless it clearly appears that he has misapprehended the evidence or has gone against the clear weight thereof, or, in other words, unless we are satisfied that his findings were clearly wrong. *U. S. v. U. S. Shoe Machinery Co.*, 247 U. S. 32, 41, 38 S. Ct. 473, 62 L. Ed. 968; *Adamson v. Gilliland*, 242 U. S. 350, 37 S. Ct. 169, 61 L. Ed. 356; *D. T. McKeithan Lumber Co. v. Fidelity Trust Co.* (C. C. A. 4th) 223 F. 773; *American Rotary Valve Co. v. Moorehead* (C. C. A. 7th) 226 F. 202; *Babeock v. DeMott* (C. C. A. 8th) 160 F. 882." (Mr. Judge Parker in *Wolf Mineral Process Corp. v. Minerals Separation North American Corp.* (C. C. A. 4th, 1927) 18 F. (2d) 483, 486, cert. den. 275 U. S. 558, 72 L. Ed. 425, 48 S. Ct. 118.)

See also *Cyclopedia of Federal Procedure* §§ 2988-2991.

practice to disturb their findings when they are properly based upon evidence, in the absence of errors of law.⁸

By reason of the similarity between adversary proceedings of the two spheres, powers inherent in arbiters of fact in judicial proceedings are impliedly inherent in administrative agencies of like character.⁹ Thus an administrative agency has the right accorded to a special master of recalling a submitted report before judicial action thereon has been taken.¹⁰

Above all, administrative agencies must act in accordance with the cherished judicial tradition embodying the basic concepts of fair play.¹¹ Judicial action, with its assurances and sanctions, offers greater security than administrative action.¹² Administrative agencies have varying qualifications and work in a field peculiarly exposed to political demands. Some may be expert and impartial, others subservient. In no case can they have any real difficulty in observing the requirements of procedural due process applicable to judicial proceedings,¹³ or in acting in accordance with the fundamental requisites of fairness so carefully developed in adversary judicial proceedings under the common law and the due process clause.¹⁴

§ 144. Courts and Agencies Are Interdependent and Coordinate.

In construing a statute setting up an administrative agency and providing for judicial review of its action, court and agency are not to be regarded as wholly independent and unrelated instrumentalities of justice, each acting in the performance of its prescribed statutory duty without regard to the appropriate function of the other in securing the plainly indicated objects of the statute.¹⁵ Court and

⁸ *Crowell v. Benson* (1932) 285 U. S. 22, 76 L. Ed. 598, 52 S. Ct. 285.

⁹ See § 150.

¹⁰ See § 175 et seq.

¹¹ *Morgan v. United States* (1938) 304 U. S. 1, 82 L. Ed. 1129, 58 S. Ct. 773, rehearing denied 304 U. S. 23, 82 L. Ed. 1135, 58 S. Ct. 999.

¹² *Ng Fung Ho v. White* (1922) 259 U. S. 276, 66 L. Ed. 938, 42 S. Ct. 492; *White v. Chin Fong* (1920) 253 U. S. 90, 64 L. Ed. 797, 40 S. Ct. 449.

¹³ *St. Joseph Stock Yards Co. v. United States* (1936) 298 U. S. 38, 80 L. Ed. 1033, 56 S. Ct. 720.

¹⁴ See § 274 et seq.

¹⁵ "Addresses before bar associations twenty years ago, discussing the rise of new administrative agencies, are reminiscent of the distrust of equity displayed by the common-law judges led by Coke, and of their resistance to its expansion. We still get the reverberations of these early fulminations in renewed alarms at our growing administrative bureaucracy and the new despotism of boards and commissions. So far as these nostalgic yearnings for an era that has passed would encourage us to stay the tide of a needed reform, they are destined to share the fate of the ob-

agency are the means adopted to attain the prescribed end, and so far as their duties are defined by the words of the statute, those words should be construed so as to attain that end through coordinated action. Neither body should repeat in this day the mistake made by the courts of law when equity was struggling for recognition as an ameliorating system of justice; neither can rightly be regarded by the other as an alien intruder, to be tolerated if it must be, but never to be encouraged or aided by the other in the attainment of the common aim.¹⁶

In the process of adjusting relations between administrative agencies, notably the Interstate Commerce Commission, and the courts to effectuate the purposes of the agencies, experience called for accommodation of the duties entrusted to them, in enforcing legislative policies, to our traditional judicial system. The Supreme Court has ascribed to the findings of the Commission the strength due to the judgments of a tribunal appointed by law and informed by experience.

stacles which Coke and his colleagues sought to place in the way of the extension of the beneficent sway of equity. These warnings should be turned to account, not in futile resistance to the inevitable, or in efforts to restrict to needlessly narrow limits activities which administrative officers can perform better than the courts, but as inspiration to the performance of the creative service which the bar and courts are privileged to render in bringing into our law the undoubted advantages of the new agencies as efficient working implements of government, surrounded, at the same time, with every needful guarantee against abuse." Harlan F. Stone in "The Common Law in the United States" (1936) 50 Harv. L. Rev. 4, 17.

¹⁶ *United States v. Morgan* (1939) 307 U. S. 183, 83 L. Ed. 1211, 59 S. Ct. 795. See *Pacific Live Stock Co. v. Lewis* (1916) 241 U. S. 440, 60 L. Ed. 1084, 56 S. Ct. 637.

"In answering these questions there are two cardinal principles which must guide us to our conclusion. The one is that in construing a statute

setting up an administrative agency and providing for judicial review of its action, court and agency are not to be regarded as wholly independent and unrelated instrumentalities of justice, each acting in the performance of its prescribed statutory duty without regard to the appropriate function of the other in securing the plainly indicated objects of the statute. Court and agency are the means adopted to attain the prescribed end, and so far as their duties are defined by the words of the statute, those words should be construed so as to attain that end through coordinated action. Neither body should repeat in this day the mistake made by the courts of law when equity was struggling for recognition as an ameliorating system of justice; neither can rightly be regarded by the other as an alien intruder, to be tolerated if must be, but never to be encouraged or aided by the other in the attainment of the common aim." (Mr. Justice Stone in *United States v. Morgan* (1939) 307 U. S. 183, 190, 191, 83 L. Ed. 1211, 59 S. Ct. 795.)

Recognition of the Commission's expertise led the court not to bind the Commission to common law evidentiary and procedural fetters in enforcing basic procedural safeguards.¹⁷ From these general considerations the court evolved two specific doctrines limiting judicial review of orders of the Interstate Commerce Commission and other agencies, to wit, the primary jurisdiction doctrine, and the doctrine of administrative finality.¹⁸ While evolved first in regard to the oldest of the country's regulatory Commissions, these two doctrines are not limited to it, but are of general application.¹⁹ Ordinarily the factor determining whether primary resort is to a court or an agency, is not the character of the function being exercised, but the character of the controverted question and the nature of the inquiry necessary for its solution.²⁰ Sometimes, however, when preliminary resort to an agency is required, this is because the function being exercised is in its nature administrative in contradistinction to judicial.²¹

§ 145. Agency Not Comparable to Lower Court.

The technical rules derived from the relationship of courts *inter sese* do not apply between courts and agencies.²² The doctrine that a lower court is bound to respect the mandate of an appellate tribunal and cannot reconsider questions which that mandate has laid to rest, is generally inapplicable upon remand from a court to an agency,²³ for

¹⁷ *Rochester Telephone Corp. v. United States* (1939) 307 U. S. 125, 83 L. Ed. 1147, 59 S. Ct. 754; *Federal Communications Commission v. Pottsville Broadcasting Co.* (1940) 309 U. S. 134, 84 L. Ed. 656, 60 S. Ct. 437; *Crowell v. Benson* (1932) 285 U. S. 22, 76 L. Ed. 598, 52 S. Ct. 285.

¹⁸ See §§ 213, 509 et seq.

¹⁹ They have been applied, among others to the Federal Communications Commission, *Rochester Telephone Corp. v. United States* (1939) 307 U. S. 125, 83 L. Ed. 1147, 59 S. Ct. 754; the Secretary of Labor, *Kessler v. Strecker* (1939) 307 U. S. 22, 83 L. Ed. 1082, 59 S. Ct. 694; the Board of Tax Appeals, *Colorado Nat. Bank v. Commissioner of Internal Revenue* (1938) 305 U. S. 23, 83 L. Ed. 20, 59 S. Ct. 48; *Helvering v. Rankin* (1935) 295 U. S. 123, 79 L.

Ed. 1343, 55 S. Ct. 732. See §§ 213, 509 et seq.

For the tendency to open discussion of the law as to other agencies by reference to the Interstate Commerce Commission, see *Louisville & N. R. Co. v. Finn* (1915) 235 U. S. 601, 59 L. Ed. 379, 35 S. Ct. 146.

²⁰ * *Great Northern R. Co. v. Merchants Elevator Co.* (1922) 259 U. S. 285, 66 L. Ed. 943, 42 S. Ct. 477.

²¹ * *Great Northern R. Co. v. Merchants Elevator Co.* (1922) 259 U. S. 285, 66 L. Ed. 943, 42 S. Ct. 477. See also § 226.

²² *Federal Communications Commission v. Pottsville Broadcasting Co.* (1940) 309 U. S. 134, 84 L. Ed. 656, 60 S. Ct. 437.

²³ *Federal Communications Commission v. Pottsville Broadcasting Co.* (1940) 309 U. S. 134, 84 L. Ed. 656, 60 S. Ct. 437. See also § 788.

the substance of the power over agencies conferred upon courts is the power of review, not of appeal.²⁴

§ 146. Some Differences Between Courts and Agencies.

Aside from the fact that agencies are ordinarily administrative arms of the legislature, so that courts and agencies belong to different constitutional spheres, there are other differences.²⁵ Agencies are or-

²⁴ *Tracy v. Commissioner of Internal Revenue* (C. C. A. 6th, 1931) 53 F. (2d) 575, cert. den. 287 U. S. 632, 77 L. Ed. 548, 53 S. Ct. 83.

²⁵ "Courts, like other organisms, represent an interplay of form and function. The history of Anglo-American courts and the more or less narrowly defined range of their staple business have determined the basic characteristics of trial procedure, the rules of evidence, and the general principles of appellate review. Modern administrative tribunals are the outgrowth of conditions far different from those. To a large degree they have been a response to the felt need of governmental supervision over economic enterprise—a supervision which could effectively be exercised neither directly through self-executing legislation nor by the judicial process. That this movement was natural and its extension inevitable, was a quarter century ago the opinion of eminent spokesmen of the law. Perhaps the most striking characteristic of this movement has been the investiture of administrative agencies with power far exceeding and different from the conventional judicial modes for adjusting conflicting claims—modes whereby interested litigants define the scope of the inquiry and determine the data on which the judicial judgment is ultimately based. Administrative agencies have power themselves to initiate inquiry, or, when their authority is invoked, to control the range of investigation in

ascertaining what is to satisfy the requirements of the public interest in relation to the needs of vast regions and sometimes the whole nation in the enjoyment of facilities for transportation, communication and other essential public services. These differences in origin and function preclude wholesale transplantation of the rules of procedure, trial, and review which have evolved from the history and experience of courts. Thus, this Court has recognized that bodies like the Interstate Commerce Commission, into whose mould Congress has cast more recent administrative agencies, 'should not be too narrowly constrained by technical rules as to the admissibility of proof,' *Interstate Commerce Commission v. Baird*, 194 U. S. 25, 44, should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties. Compare *New England Divisions Case*, 261 U. S. 184. To be sure, the laws under which these agencies operate prescribe the fundamentals of fair play. They require that interested parties be afforded an opportunity for hearing and that judgment must express a reasoned conclusion. But to assimilate the relation of these administrative bodies and the courts to the relationship between lower and upper courts is to disregard the origin and purposes of the movement for administrative regulation and at the same time to disregard the traditional scope,

dinarily not bound by the rules of evidence,²⁶ they determine controversies not so much by fixed rules of law as by application of legislative discretion, much as does an equity judge in the exercise of judicial discretion,²⁷ and they do not have that independence from executive, legislative or political influence which is a guaranty of justice. They are exposed to the influence of all the political forces which are brought to bear upon the government.²⁸ The only means of judicial control are the ordinary forms of action, or those specially provided by statute, including the extraordinary writs of mandamus and injunction.²⁹ Suits against federal administrative officers for damages have little practical value today.³⁰

Administrative agencies may not exercise judicial functions.³¹ For instance, they may not find the fact of guilt and adjudge the punishment for a criminal act.³²

however far-reaching, of the judicial process. Unless these vital differentiations between the functions of judicial and administrative tribunals are observed, courts will stray outside their province and read the laws of Congress through the distorting lenses of inapplicable legal doctrine." (Mr. Justice Frankfurter in *Federal Communications Commission v. Pottsville Broadcasting Co.* (1940) 309 U. S. 134, 142-144, 84 L. Ed. 361, 60 S. Ct. 437.)

²⁶ See §§ 166, 579.

²⁷ See § 66 et seq.

²⁸ See John Dickinson in "Administrative Justice and the Supremacy of Law," (1927) p. 35.

²⁹ See §§ 688, 704 et seq.

³⁰ See John Dickinson in "Administrative Justice and the Supremacy of Law," (1927) p. 39. See § 826.

³¹ See § 73 et seq.

³² *Wong Wing v. United States* (1896) 163 U. S. 228, 41 L. Ed. 140, 16 S. Ct. 977.

CHAPTER 7

ADMINISTRATIVE ACTION INVOLVING MORE THAN ONE AGENCY

§ 147. Coordinate Action by Different Agencies.

The subject-matter of administrative action in some instances, though itself single, may give rise to different questions properly within the exclusive jurisdiction of separate agencies. In such cases the agencies may be cooperating parts of a single regulatory scheme, or they may be totally unconnected, as in the case where one agency is federal and one state. Different agencies may carry out different parts of the administrative process, but in doing so be none the less part of a single regulatory scheme, with coordinate functions.¹ For instance, where a finding is made by the Interstate Commerce Commission which may not be the basis of a sanction or order by the Commission but may be the basis of an order by the National Mediation Board, the finding may be judicially reviewed in a suit to restrain a United States attorney from a criminal prosecution based upon the order of the Mediation Board.²

Where each of two agencies has properly within its jurisdiction, to the exclusion of the other, a separate question raised by a single transaction, each may act within its province, but may not extend its action into the province of the other.³ Thus rights based upon the action of one agency upon one question cannot be asserted in proceedings before the other upon another question, where the first question is not logically involved. For instance the fact that the Interstate Commerce Commission has not issued a certificate of convenience and necessity for an extension cannot be asserted in a proceeding before a state agency to fix the place and manner of a proposed crossing of railroad tracks.⁴

¹ *Shields v. Utah Idaho C. R. Co.* 76, 77 L. Ed. 1042, 53 S. Ct. 516; (1938) 305 U. S. 177, 83 L. Ed. 111, *Smith v. Illinois Bell Telephone Co.* 59 S. Ct. 160. (1930) 282 U. S. 133, 75 L. Ed. 255,

² *Shields v. Utah Idaho C. R. Co.* 51 S. Ct. 65. (1938) 305 U. S. 177, 83 L. Ed. 111, 59 S. Ct. 160.

³ *St. Louis Southwestern R. Co. v. Missouri Pac. R. Co.* (1933) 289 U. S.

⁴ *St. Louis Southwestern R. Co. v. Missouri Pac. R. Co.* (1933) 289 U. S. 76, 77 L. Ed. 1042, 53 S. Ct. 516.

The Clayton Act⁵ is ordinarily the concern of the Federal Trade Commission. Where relevant, however, the Interstate Commerce Commission may decide whether it has been violated, and if such violation is material, in a proceeding before the Interstate Commerce Commission.⁶

§ 148. Transfer of Administrative Functions to a Different Agency.

By appropriate legislation Congress may transfer the functions of an administrative agency to another agency.⁷ Transfer of the administrative functions of one agency to another agency may, in an appropriate case upon statutory authority, be accomplished by executive order.⁸ Whether the Congress has power to delegate to the President authority to determine whether the functions of the United States Shipping Board should be transferred to the Secretary of Commerce has been expressly left open.⁹

As Congress has the power to abolish one administrative agency and to require its functions to be performed by a second agency, Congress has power to recognize and validate the second agency's performance of those functions, in a proper case, even if there has been no valid transfer of the functions.¹⁰

Retroactive validation by Congress of such administrative action is within the powers of Congress where (1) it does not create liabilities for past transactions, but is a curative statute aptly designed to remedy mistakes and defects in the administration of government and (2) where the remedy can be applied without injustice, the retroactive application of the curative act impairs no substantial right or equity of the parties involved, such as their rights to administrative hearing and determination and to judicial review, and these rights are as fully protected as if the validating statute had been adopted beforehand.¹¹ Under those circumstances the validating

⁵ 15 USCA 12-27, 44, 18 USCA 412, 28 USCA 381-383, 386-390, 29 USCA 52.

⁶ See *Pittsburgh & W. Va. R. Co. v. United States* (1930) 281 U. S. 479, 74 L. Ed. 980, 50 S. Ct. 378.

⁷ *Isbrandtsen-Moller Co., Inc. v. United States* (1937) 300 U. S. 139, 81 L. Ed. 562, 57 S. Ct. 407.

⁸ See *Isbrandtsen-Moller Co., Inc. v. United States* (1937) 300 U. S. 139,

81 L. Ed. 562, 57 S. Ct. 407.

⁹ *Swayne & Hoyt, Ltd. v. United States* (1937) 300 U. S. 297, 81 L. Ed. 659, 57 S. Ct. 478.

¹⁰ *Swayne & Hoyt, Ltd. v. United States* (1937) 300 U. S. 297, 81 L. Ed. 659, 57 S. Ct. 478.

¹¹ *Swayne & Hoyt, Ltd. v. United States* (1937) 300 U. S. 297, 81 L. Ed. 659, 57 S. Ct. 478.

statute is free of the elements of novelty and surprise which lead to condemnation as unreasonable and arbitrary.¹²

Where an order of the Secretary of Commerce has by legislation become an order of the Maritime Commission, its validity as an order of the Secretary of Commerce will not be considered.¹³

The question whether the functions of the Shipping Board may be validly transferred to the Secretary of Commerce so as to make the head of an executive department also a judicial officer and a legislative officer, has been expressly left open.¹⁴ But the head of an executive department may also act as the administrative agent of the legislature.¹⁵

The question whether the functions of the Shipping Board can be validly transferred to the president of a private shipping company in competition with a complaining carrier, has been expressly left open.¹⁶

¹² Swayne & Hoyt, Ltd. v. United States (1937) 300 U. S. 297, 81 L. Ed. 659, 57 S. Ct. 478.

¹³ Isbrandtsen-Moller Co., Inc. v. United States (1937) 300 U. S. 139, 81 L. Ed. 562, 57 S. Ct. 407.

¹⁴ Isbrandtsen-Moller Co., Inc. v. United States (1937) 300 U. S. 139, 81 L. Ed. 562, 57 S. Ct. 407. See also § 20.

81 L. Ed. 562, 57 S. Ct. 407.

¹⁵ See Morgan v. United States (1936) 298 U. S. 468, 80 L. Ed. 1288, 56 S. Ct. 906, and §§ 83, 85 and 141.

¹⁶ Isbrandtsen-Moller Co., Inc. v. United States (1937) 300 U. S. 139,

81 L. Ed. 562, 57 S. Ct. 407. See also § 20.

BOOK II

ADMINISTRATIVE PROCEEDINGS

CHAPTER 8

ASPECTS OF ADMINISTRATIVE PROCEEDINGS

- § 149. Introduction.
- § 150. Adversary Administrative Proceedings Comparable to Judicial Proceedings; Implied Judicial Powers.
- § 151. Legal Effect of Institution of Proceedings.
- § 152. Importance of Success in Administrative Proceedings.
- § 153. Desirability of Full Exhaustion of Administrative Remedies.
- § 154. Initiation of Proceedings by Private Litigants.
- § 155. Initiation of Proceedings by Agencies.

§ 149. Introduction.

The subject of administrative proceedings, from the all-important practical viewpoint, is immensely wide in scope. The only purpose of this work in dealing with this subject is to set forth the aspects of administrative proceedings which have been dealt with by the courts. Administrative procedure before particular agencies is amply set forth elsewhere.¹ There are valuable additional sources which throw light on administrative procedure. Rules of practice set up a definite framework for proceedings before a particular agency, and are readily available in published form. The first step of a lawyer confronted with a proceeding before a particular agency should be to secure and study the agency's rules of practice.² Interesting procedural infor-

¹ The various Monographs of the Attorney General's Committee on Administrative Procedure are especially valuable. See Elmer A. Smith in "Practice and Procedure Before the Interstate Commerce Commission," (1937) 5 Geo. Wash. L. Rev. 404. H.

L. McClintock in "The Administrative Determination of Public Land Controversies," (1925) 9 Minn. L. Rev. 420, 542 and 638.

² Rules of practice for a particular agency can be found in the Federal Register, or obtained from any office

mation is tucked away in administrative reports which deal primarily with other subject matter, and knowledge of the informal, unwritten practices of a particular agency is of inestimable value, and will undoubtedly continue to be so until administrative procedure becomes more standardized.

Above all, this chapter should be read in connection with the chapter on the requisites of procedural due process applicable to administrative proceedings.

This work does not pretend to deal with the substantive fields of administrative activity and the ends therein sought to be accomplished,³ nor with the volume of business of the various agencies.⁴

§ 150. Adversary Administrative Proceedings Comparable to Judicial Proceedings; Implied Judicial Powers.

There are two general types of adversary proceedings, (1) those where opposing parties try out questions before an impartial agency, and (2) those where the agency contends that the particular questions involved should be determined in a particular way, and then proceeds to determine the questions. The latter are commonly referred to as acting as "prosecutor, judge and jury." Nevertheless the rules of law applicable to both types of proceedings are substantially the same.

Adversary administrative proceedings are quasi-judicial in character, and must be conducted in accordance with the cherished judicial tradition. They are comparable to judicial proceedings.⁵ The quasi-judicial character of adversary administrative proceedings not only inherently subjects them to the constitutional requirements of procedural due process, but by implication also confers upon the agency the judicial powers which are inherent in the conduct of judicial proceedings. All the basic procedural steps and powers

of the agency. They are amended from time to time.

See John H. Wigmore in "Federal Administrative Agencies: How to Locate Their Rules of Practice and Their Rulings with Special Reference to Their Rules of Evidence" (1939) 25 Am. Bar Ass'n Jour. 25.

³ See the discussion of "Federal Administrative Activity Affecting Private Interests by Rule Making or Adjudication" in the Final Report of the Attorney General's Committee

on Administrative Procedure (1941) p. 261 et seq.

⁴ For figures and an interesting discussion of the volume of business of various administrative agencies, see the Final Report of the Attorney General's Committee on Administrative Procedure (1941) p. 313 et seq.

⁵ National Labor Relations Board v. Sterling Electric Motors, Inc. (C. C. A. 9th, 1940) 109 F. (2d) 194. See also § 274 et seq.

which are inherent in the conduct of a judicial proceeding, are substantially inherent in the conduct of an adversary administrative proceeding. Thus, at least in the absence of a statute to the contrary, the power of an administrative agency to refuse to dismiss a proceeding on motion of the one who instituted it cannot be greater than the power which may be exercised by the judicial tribunals of the land under similar circumstances.⁶ Telegraphic notice by the Securities and Exchange Commission to a party fixing a time for him to appear and show cause why a stop order should not be issued suspending the effectiveness of such registration statement is a proceeding analogous to a suit in equity to obtain an injunction, and should be governed by like considerations.⁷ It had the effect of suspending the effective operation of the statement pending the hearing and determination of the stop order proceeding as effectively as if a preliminary stop or restraining order had been issued. Its practical effect was to suspend, pending the inquiry, all action of the registrant under his statement.⁸ The quasi-judicial nature of administrative proceedings has as a necessary implication the power to take judicial notice.⁹ Also generally applicable to administrative proceedings are the judicial rules regarding presumptions,¹⁰ and motions.¹¹ An administrative agency has the right accorded to a special master in a judicial proceeding of recalling a submitted report before judicial action thereon has been taken.¹² As with judicial proceedings, administrative proceedings, though not controlled by the technical rules of procedure which prevail in common-law and equity proceedings, must be kept within the bounds of reason and fairness.¹³

⁶ *Jones v. Securities & Exchange Commission* (1936) 298 U. S. 1, 80 L. Ed. 1015, 56 S. Ct. 654.

⁷ *Jones v. Securities & Exchange Commission* (1936) 298 U. S. 1, 80 L. Ed. 1015, 56 S. Ct. 654.

⁸ *Jones v. Securities & Exchange Commission* (1936) 298 U. S. 1, 80 L. Ed. 1015, 56 S. Ct. 654; *Oklahoma-Texas Trust v. Securities & Exchange Commission* (C. C. A. 10th, 1939) 100 F. (2d) 888.

⁹ See *Sibley, J.*, dissenting in *Kessler v. Strecker* (C. C. A. 5th, 1938) 96 F. (2d) 1020, *aff'd* 307 U. S. 22, 83 L. Ed. 1082, 59 S. Ct. 694. See

§§ 170, 171.

¹⁰ *Jones v. Securities & Exchange Commission* (1936) 298 U. S. 1, 80 L. Ed. 1015, 56 S. Ct. 654. See § 754.

¹¹ *Jones v. Securities & Exchange Commission* (1936) 298 U. S. 1, 80 L. Ed. 1015, 56 S. Ct. 654; *Consolidated Edison Co. v. National Labor Relations Board* (1938) 305 U. S. 197, 83 L. Ed. 126, 59 S. Ct. 206.

¹² *Matter of National Labor Relations Board* (1938) 304 U. S. 486, 82 L. Ed. 1482, 58 S. Ct. 1001.

¹³ *Foss v. Commissioner of Internal Revenue* (C. C. A. 1st, 1935) 75 F. (2d) 326.

Administrative proceedings, such as deportation proceedings, are in their nature civil, and presumptions and rules of evidence applicable to criminal proceedings can have no application.¹⁴

§ 151. Legal Effect of Institution of Proceedings.

The institution of administrative proceedings may, because of statutory implications, have certain legal effect. Thus the action of a company ordered to divest itself of a competitor's stock falls within the jurisdiction of the Federal Trade Commission where the company purchased the competitor's assets and then transferred the stock, where such action occurred after institution of the administrative proceedings.¹⁵

§ 152. Importance of Success in Administrative Proceedings.

The practical importance of success in administrative proceedings can hardly be overemphasized. Activity in administrative proceedings is activity within the legislative sphere. Judicial review is ordinarily limited by the separation of powers to a few basic constitutional principles. The departure from activity within the administrative sphere, after the conclusion of administrative proceedings, into the judicial sphere, therefore has profound implications. They should not be treated lightly. If there is any chance of obtaining from an administrative agency the relief which is desired, vigorous application to the agency should be made, even by petition for rehearing or otherwise, since the same relief may seldom, if ever, be obtained in a judicial proceeding.¹⁶ Once administrative relief is abandoned, it should be remembered that judicial relief may be had only on questions of law, based upon an entirely different philosophy. Under the separation of powers one seeking judicial relief is ordinarily bound at the outset by the primary jurisdiction doctrine,¹⁷ the requirement that administrative remedies be exhausted before seeking judicial relief,¹⁸ and the doctrine of administrative finality.¹⁹ Above

¹⁴ United States ex rel. Bilokumsky v. Tod (1923) 263 U. S. 149, 68 L. Ed. 221, 44 S. Ct. 54; Lewis v. Frick (1914) 233 U. S. 291, 58 L. Ed. 967, 34 S. Ct. 488.

¹⁵ Federal Trade Commission v. Western Meat Co. (1926) 272 U. S. 554, 71 L. Ed. 405, 47 S. Ct. 175; International Shoe Co. v. Federal Trade Commission (C. C. A. 1st, 1928) 29 F.

(2d) 518, rev'd 280 U. S. 291, 74 L. Ed. 431, 50 S. Ct. 89 (1930). See Federal Trade Commission v. Eastman Kodak Co. (1927) 274 U. S. 619, 71 L. Ed. 1238, 47 S. Ct. 688.

¹⁶ See § 183 et seq.

¹⁷ See § 213 et seq.

¹⁸ See § 226 et seq.

¹⁹ See § 509.

all, the heavy psychological burden attendant upon attempts to induce a reviewing court to make the necessary exhaustive analysis of a voluminous administrative record, and to distinguish between judicial and administrative questions in complex cases,²⁰ speaks compellingly for the value of success in administrative proceedings.

This, however, is not to imply that judicial review should be abandoned simply because of an adverse administrative determination. The books are full of instances which have been adjudged by the courts to be arbitrary or otherwise contrary to law. And although the rough and tumble of litigated administrative law cases has gradually tended to clarify rights and duties, and to induce orderly procedure by both agencies and litigants, the creation of each new agency gives rise to a host of new legal questions, and to an unstable administrative procedure. Hence where the conduct or determination of an agency can be shown to be arbitrary or otherwise unlawful, an appropriate suit for judicial review is essential to the orderly administration of justice.

§ 153. Desirability of Full Exhaustion of Administrative Remedies.

In the early days of the development of administrative law there was great uncertainty as to the rights and duties of parties and agencies. A common attitude of litigants was that of endeavoring to "trap" the agency into committing an error so that its determinations would be invalidated in a reviewing court. This attitude was usually prompted by the conviction that a particular agency was not fair-minded but, being dominated by political zeal or other ulterior motives, was intent upon a determination stimulated by considerations other than the evidence and the law. This attitude by litigants has usually been directed toward newly-created agencies which are more apt to be freshly endowed with a prevailing political philosophy, rather than toward the established agencies whose conduct has been stabilized by experience and an appreciation of the importance of private rights in the particular field. But even when this attitude toward an agency is justified by the background in a particular case, there is seldom any practical value in refusing deliberately to exhaust fully an available administrative remedy. Only where constitutional or statutory rights have been clearly invaded, beyond reasonable question, can it be of any real value to a party to pound the table, announce that he is standing on his "rights," constitutional

²⁰ See §§ 423, 505 et seq.

or otherwise, and refuse to proceed further. The era when this attitude may have found favor has passed. The presumption in favor of valid administrative action²¹ can only be overcome today by an affirmative showing, which is difficult to make where administrative remedies have not been pursued.

For instance, it was a usual trick, where constitutional questions were involved, to withhold controlling evidence from the administrative proceedings and introduce it for the first time upon trial *de novo*. That device, however, is no longer of value and, on the contrary, will react to one's detriment.²²

§ 154. Initiation of Proceedings by Private Litigants.

Under some statutory provisions interested private litigants, such as shippers under the Interstate Commerce Act, may institute administrative proceedings by the filing of a complaint with the agency charging violation of the statute. In such instances the party filing the complaint becomes, in effect, the plaintiff in the proceeding. A state may initiate an administrative proceeding as a private litigant.²³

§ 155. Initiation of Proceedings by Agencies.

Many statutes, on the other hand, provide for the initiation of administrative proceedings by the very agency which is to pass on the questions involved. Even the Interstate Commerce Commission may of its own motion investigate and act upon any matter which may be the subject of its jurisdiction, without a moving complaint from an interested party.²⁴ On the other hand many proceedings instituted by agencies are brought only as a result of a complaint filed with the agency by a private party. Proceedings instituted by an agency are usually brought to enforce public, rather than private, rights.

²¹ See § 755.

²² See § 747 et seq.

²³ *Atchison, T. & S. F. R. Co. v. Railroad Commission* (1931) 283 U. S. 380, 75 L. Ed. 1128, 51 S. Ct. 553; *United States v. New York Cent. R.*

Co. (1926) 272 U. S. 457, 71 L. Ed. 350, 47 S. Ct. 130.

²⁴ *United States v. New York Cent. R. Co.* (1926) 272 U. S. 457, 71 L. Ed. 350, 47 S. Ct. 130.

CHAPTER 9

PLEADINGS

§ 156. Form Should Resemble Pleadings in Judicial Proceedings.

Adversary administrative proceedings being of a quasi-judicial character,¹ have the inherent procedural attributes of adversary judicial proceedings.^{1a} Thus pleadings in administrative proceedings should conform generally to the judicial requisites of pleading, which are the result of a long development of forms best calculated to focus issues and provide notice and opportunity to meet opposing claims.² Conclusions of fact, rather than evidence, should be pleaded. To plead a specific statute relied on is no more necessary in a proceeding before an agency than in a judicial proceeding. It is enough if the allegations of the complaint in matters of fact are sufficient to authorize the agency to consider the case under such provision.³ Ordinarily an agency's jurisdiction is confined to the issues raised in the pleadings.⁴ An issue, such as the validity of a contract, not mentioned in a complaint nor raised by answer is not litigated merely because a party with valuable and beneficial interests involved in the issue as a party to the contract, intervenes on judicial review.⁵ Failure to present before a compensation commissioner the question of a claimant's status, which controlled her right to receive an award, was held to waive the issue.⁶

Constitutional questions may be raised in the pleadings and it is advisable, though not necessary, to do so.⁷ Yet failure by the defending party to raise them before an administrative agency does not preclude their consideration on judicial review.⁸

¹ See §§ 67, 276.

^{1a} See § 150.

² See § 290 et seq.

³ *Chicago, R. I. & P. R. Co. v. United States* (1927) 274 U. S. 29, 71 L. Ed. 911, 47 S. Ct. 486.

⁴ *Hanby v. Commissioner of Internal Revenue* (C. C. A. 4th, 1933) 67 F. (2d) 125.

⁵ *Consolidated Edison Co. v. National Labor Relations Board* (1938)

305 U. S. 197, 83 L. Ed. 126, 59 S. Ct. 206.

⁶ *Southern Shipping Co. v. Lawson* (D. C. S. D. Fla., Jacksonville Div., 1933) 5 F. Supp. 321.

⁷ *American Toll Bridge Co. v. Railroad Commission* (1939) 307 U. S. 486, 83 L. Ed. 1414, 59 S. Ct. 948; *Manufacturers R. Co. v. United States* (1918) 246 U. S. 457, 62 L. Ed. 831, 38 S. Ct. 383. See also § 240 et seq.

⁸ See § 240.

There is a substantial difference in legal effect between the filing of a complaint and the taking of administrative action thereon. The latter constitutes completion of the legislative process and marks in substance the taking of legislative action.^{8a} The mere filing of a complaint or application, however, does not have this effect. Thus a motor carrier which has filed an application for regulation by the Interstate Commerce Commission under the Federal Motor Carrier Act, remains subject to state regulation of its intrastate commerce while the application is pending, although the result would be otherwise after granting of the application.⁹

The order of an administrative agency is analogous to an injunction or restraining order, and may not be rightly issued by the agency or enforced by a court on the agency's petition, touching a matter not complained of or as to which the evidence shows neither a past nor a threatened wrongdoing.¹⁰ Despite their general conformity to pleadings in judicial proceedings, however, pleadings in administrative proceedings need not fulfill technical common-law requirements.¹¹

§ 157. Amendments to Pleadings.

Where a trial examiner allowed amendments to the complaint, on a motion to conform the pleadings to the proof and no important change was intended, but the amendment merely sought to make more definite and certain what appeared in the complaint, this was a discretionary ruling, which afforded no ground for challenging the validity of the hearing.¹² Appropriate amendments to pleadings in administrative proceedings may be deemed to have been made in the Supreme Court because of the conduct of the parties.¹³

^{8a} See § 66 et seq.

⁹ *Eichholz v. Public Service Commission of Missouri* (1939) 306 U. S. 268, 83 L. Ed. 641, 59 S. Ct. 532, rehearing denied 306 U. S. 669, 83 L. Ed. 1063.

¹⁰ *Globe Cotton Mills v. National Labor Relations Board* (C. C. A. 5th, 1939) 103 F. (2d) 91.

¹¹ *Farmers' Livestock Commission Co. v. United States* (D. C. E. D. Ill., 1931) 54 F. (2d) 375.

¹² *Consolidated Edison Co. v. National Labor Relations Board* (1938) 305 U. S. 197, 83 L. Ed. 126, 59 S. Ct. 206.

¹³ See § 806.

CHAPTER 10

PARTIES

- § 158. In General.
- § 159. Parties Complainant.
- § 160. Defending Parties.
- § 161. Intervening Parties.
- § 162. Misjoinder of Parties.

§ 158. In General.

In general the parties to administrative proceedings are those authorized to become so by statute or by implication from analogy to the judicial tradition. Where statutory prerequisites to joining a party to an administrative proceeding have not been met, no valid administrative order can be made against that party.¹

§ 159. Parties Complainant.

Where a statute creates a right enforceable in an administrative proceeding upon the complaint of certain specified parties, the agency has power to act only upon the application of a party specified, and may not act upon complaint of others.² Where the agency has power to institute a proceeding of its own motion, there is no reason for giving the statutory remedy a procedural narrowness that would preclude the agency from utilizing the complaint of a third party, even if in some respects irregular.³ The power of the Interstate Commerce Commission to make safety rules may obviously be exercised on complaint of the Brotherhoods representing employees directly affected.⁴

§ 160. Defending Parties.

In proceedings as to the validity of part of a joint through rate, and its division, only carriers participating in that part of the joint

¹ National Labor Relations Board v. 216 U. S. 531, 54 L. Ed. 605, 30 S. Ct. 415.
Cowell Portland Cement Co. (C. C. A. 9th, 1939) 108 F. (2d) 198; National

Labor Relations Board v. Hopwood (D. C. S. D. N. Y., 1931) 53 F. (2d) 251.
Retinning Co., Inc. (C. C. A. 2d, 1938) 98 F. (2d) 97.

² Interstate Commerce Commission v. Delaware, L. & W. R. Co. (1910) 587, 55 S. Ct. 268.
³ Isthmian S. S. Co. v. United States (D. C. S. D. N. Y., 1931) 53 F. (2d) 251.
⁴ United States v Baltimore & O. R. Co. (1935) 293 U. S. 454, 79 L. Ed.

rate need be joined, not ⁵ all those interested in and working under the whole joint rate. There is no defect of parties such as to invalidate the order where all who are in terms affected—all whose shares are changed—are joined, even if all participating carriers could properly have been joined. It is not necessary to settle all conceivable controversies in one proceeding.⁶ But where a shipper attacks a through rate all participating carriers must be made respondents, even though the through rate is made up of separately established elements. The complainant may wish to direct his attack only against one of these. But it is only the through rate which is in issue. It may be reasonable although one of its elements is not. It must stand or fall as an entirety.⁷

Failure to bring in newly organized steamship companies by supplemental petitions was held not fatal to the order, in proceedings before the Shipping Board, where the newly organized corporations answered the complaint addressed to their predecessors and took part in the proceedings.⁸

§ 161. Intervening Parties.

A party may be granted leave to intervene in an administrative proceeding upon a finding by the agency that it has an interest in the proceeding.⁹ A party so intervening has all the rights of an original party to the proceeding.¹⁰ Right to intervene usually depends upon whether a party's legal rights are involved in the outcome of the administrative hearing.¹¹ However, whether an interested person's petition to intervene should be granted is ordinarily to be decided in the exercise of the agency's discretion¹² and the fact of intervention

⁵ *Beaumont, S. L. & W. R. Co. v. United States* (1930) 282 U. S. 74, 75 L. Ed. 221, 51 S. Ct. 1.

⁶ *United States v. Abilene & S. R. Co.* (1924) 265 U. S. 274, 68 L. Ed. 1016, 44 S. Ct. 565.

⁷ *United States v. Abilene & S. R. Co.* (1924) 265 U. S. 274, 68 L. Ed. 1016, 44 S. Ct. 565.

⁸ *Isthmian S. S. Co. v. United States* (D. C. S. D. N. Y., 1931) 53 F. (2d) 251.

⁹ *The Chicago Junction Case* (1924) 264 U. S. 258, 68 L. Ed. 667, 44 S. Ct. 317.

¹⁰ *The Chicago Junction Case* (1924) 264 U. S. 258, 68 L. Ed. 667, 44 S. Ct. 317.

¹¹ *Sunshine Broadcasting Co. v. Fly* (D. C. D. C., 1940) 33 F. Supp. 560.

¹² *Sykes v. Jenny Wren Co.* (1935) 64 App. D. C. 379, 78 F. (2d) 729, 104 A. L. R. 864, cert. den. 296 U. S. 624, 80 L. Ed. 443, 56 S. Ct. 147 (FCC). See *National Labor Relations Board v. Sterling Electric Motors, Inc.* (C. C. A. 9th, 1940) 109 F. (2d) 194; *Isthmian S. S. Co. v. United States* (D. C. S. D. N. Y., 1931) 53 F. (2d) 251.

of such parties cannot affect the validity of the order made.¹³ But where a rate order deprives a shipper of a competitive economic advantage he has the right under the Interstate Commerce Act to intervene before the Interstate Commerce Commission.¹⁴ And by statute this gives the right to intervene in a suit to set aside the order. But these rights do not, without more, give the right to maintain an independent suit attacking the order.¹⁵

It has been held that a union, concerning which a respondent employer has been accused of domination in a proceeding before the National Labor Relations Board, has no right to intervene even though the proceedings may result in an administrative sanction requiring the employer to "disestablish" the union.¹⁶ The contrary rule would appear to be the better view.¹⁷

The companion question, whether the agency should postpone its hearing in order to permit an intervenor to go through preliminary proceedings, should ordinarily be likewise decided in the discretion of the agency. This becomes of practical importance where there are two applicants for permits to use the same radio facilities, one earlier than the other.¹⁸

§ 162. Misjoinder of Parties.

The technical rules as to misjoinder of parties applicable to an action at law or a criminal prosecution do not apply with the same rigidity to the proceedings of administrative tribunals.¹⁹

¹³ *Isthmian S. S. Co. v. United Labor Relations Board* (C. C. A. 7th, States (D. C. S. D. N. Y., 1931) 53 1940) 109 F. (2d) 9.
F. (2d) 251.

¹⁴ *Alexander Sprunt & Son v. v. Sterling Electric Motors, Inc.* (C. United States (1930) 281 U. S. 249, C. A. 9th, 1940) 109 F. (2d) 194.
74 L. Ed. 832, 50 S. Ct. 315.

¹⁵ *Alexander Sprunt & Son v. Federal Communications Commission* (1939) 70 App. D. C. 258, 105 F. (2d) 781.
United States (1930) 281 U. S. 249,
74 L. Ed. 832, 50 S. Ct. 315. See also

§ 188 et seq.

¹⁶ *Inland Steel Co. v. National Co. v. United States* (D. C. E. D. Ill., 1931) 54 F. (2d) 375.

¹⁷ *National Labor Relations Board v. Sterling Electric Motors, Inc.* (C. C. A. 9th, 1940) 109 F. (2d) 194.

¹⁸ *Colonial Broadcasters, Inc. v. Federal Communications Commission* (1939) 70 App. D. C. 258, 105 F. (2d) 781.

¹⁹ *Farmers' Livestock Commission Co. v. United States* (D. C. E. D. Ill., 1931) 54 F. (2d) 375.

CHAPTER 11

HEARING

§ 163. Introduction.

I. MOTIONS

§ 164. In General.

II. EVIDENCE

§ 165. Introduction.

§ 166. Rules of Evidence Not Necessarily Controlling.

§ 167. Practical Desirability of Making All Possible Proof in Administrative Proceedings.

§ 168. Presumptions.

§ 169. Burden of Proof.

§ 170. Judicial Notice.

§ 171. —Change in Economic Conditions.

§ 172. Referenda.

§ 173. Failure to Use Interim Judicial Remedy to Adduce Evidence.

III. EXAMINERS; REPORTS AND EXCEPTIONS THERETO

§ 174. Examiners in General.

§ 163. Introduction.

The word "hearing," as ordinarily used, means the whole administrative proceeding, down to and including issuance of the report and order.¹

I. MOTIONS

§ 164. In General.

In general, the same motions may be made in administrative proceedings which are traditional steps in equivalent judicial procedure, even though not specifically provided for by statute or administrative rule of practice.² In the absence of statutory provisions to the contrary the power of an administrative agency to dispose of motions cannot be greater than that exercised by the judicial tribunals of the land under similar circumstances.³ Thus a motion to conform

¹ International Banding Machine Co. v. Commissioner of Internal Revenue (C. C. A. 2d, 1930) 37 F. (2d) 660. 59 S. Ct. 206. See § 150.

² See Consolidated Edison Co. v. National Labor Relations Board (1938) 305 U. S. 197, 83 L. Ed. 126, 59 S. Ct. 206; Jones v. Securities & Exchange Commission (1936) 298 U. S. 1, 80 L. Ed. 1015, 56 L. Ed. 654. ³ Consolidated Edison Co. v. National Labor Relations Board (1938) 305 U. S. 197, 83 L. Ed. 126, 59 S. Ct. 206.

pleadings to proof is a discretionary motion subject to the same general rules as a similar motion in a judicial proceeding.⁴ An act setting up an administrative scheme may not be construed as attempting to confer upon an administrative agency an arbitrary power, under rule or otherwise, to deny, without reason, a motion to dismiss.⁵ At least in the absence of a statute to the contrary, the power of a Commission to refuse to dismiss a proceeding on motion of the one who instituted it cannot be greater than the power which may be exercised by the judicial tribunals of the land under similar circumstances.⁶

Denial of a motion to consolidate is not an abuse of administrative discretion where the purpose of consolidation is to dispose of a question which was in fact fully raised in each proceeding.⁷ Constitutional questions may be raised in administrative proceedings by motion, although it is ordinarily not necessary to do so.⁸

II. EVIDENCE

§ 165. Introduction.

This section should be read in conjunction with the chapter on procedural due process. A party to an adversary administrative proceeding has the privilege of introducing evidence;⁹ nothing not introduced as evidence may be treated as such by the agency or the parties;¹⁰ and the agency is under a duty to decide in accordance with the evidence.¹¹

§ 166. Rules of Evidence Not Necessarily Controlling.

The Constitution does not require that the rules of evidence should control in administrative proceedings. The requisites of procedural due process, being substantial rather than technical, stop short of any such demand.¹² The mere admission by an administrative tribunal of matter which under the rules of evidence applicable to judicial proceedings would be deemed incompetent does not invalidate

⁴ Consolidated Edison Co. v. National Labor Relations Board (1938) 305 U. S. 197, 83 L. Ed. 126, 59 S. Ct. 206; International Banding Machine Co. v. Commissioner of Internal Revenue (C. C. A. 2d, 1930) 37 F. (2d) 660.

⁵ Jones v. Securities & Exchange Commission (1936) 298 U. S. 1, 80 L. Ed. 1015, 56 S. Ct. 654.

⁶ Jones v. Securities & Exchange

Commission (1936) 298 U. S. 1, 80 L. Ed. 1015, 56 S. Ct. 654.

⁷ Northern Pac. R. Co. v. United States (1933) 288 U. S. 490, 77 L. Ed. 914, 53 S. Ct. 406.

⁸ See § 239 et seq.

⁹ See § 303 et seq.

¹⁰ See § 314 et seq.

¹¹ See § 314 et seq.

¹² See §§ 274 et seq., 579.

its order.¹³ The inquiry of a board of the character of the Interstate Commerce Commission should not be too narrowly constrained by technical rules as to the admissibility of proof.¹⁴

§ 167. Practical Desirability of Making All Possible Proof in Administrative Proceedings.

It is the best practice to introduce all relevant evidence in the administrative proceeding, from the standpoint of judicial review as well as that of success in the administrative proceeding.¹⁵ This applies in respect to administrative questions in order to avoid obvious difficulties to the complaining party in a reviewing court caused by lack of favorable evidence combined with refusal to introduce evidence, and the more serious difficulties caused by inability, without good reason, to present evidence once the administrative proceeding is closed.¹⁶ It applies in respect to judicial questions which depend upon findings of fact, since the most favorable findings of fact possible are desirable. These in turn must have their basis in evidence.¹⁷ It applies in respect to constitutional issues, even though there is the right to trial *de novo* in the reviewing court.¹⁸ The Supreme Court has taken pains to point out that the "better practice," that best calculated to demonstrate good faith and enlist a reviewing court's sympathy, is to introduce all relevant evidence before the agency—not to withhold pertinent evidence deliberately in administrative proceedings with the purpose of introducing it for the first time in court upon trial *de novo*.¹⁹ Under the National Labor Relations Act a

¹³ United States v. Abilene & S. R. Co. (1924) 265 U. S. 274, 68 L. Ed. 1016, 44 S. Ct. 565.

¹⁴ "The inquiry of a board of the character of the Interstate Commerce Commission should not be too narrowly constrained by technical rules as to the admissibility of proof. Its function is largely one of investigation and it should not be hampered in making inquiry pertaining to interstate commerce by those narrow rules which prevail in trials at common law where a strict correspondence is required between allegation and proof." (Mr. Justice Day in Interstate Commerce Commission v. Baird (1904) 194 U. S. 25, 44, 48 L. Ed. 860, 24 S. Ct. 563.)

¹⁵ * Manufacturers R. Co. v. United

States (1918) 246 U. S. 457, 62 L. Ed. 831, 38 S. Ct. 383. See National Labor Relations Board v. Anwelt Shoe Mfg. Co. (C. C. A. 1st, 1937) 93 F. (2d) 367.

¹⁶ See § 575 et seq.

¹⁷ Manufacturers R. Co. v. United States (1918) 246 U. S. 457, 62 L. Ed. 831, 38 S. Ct. 383.

¹⁸ Manufacturers R. Co. v. United States (1918) 246 U. S. 457, 62 L. Ed. 831, 38 S. Ct. 383. See National Labor Relations Board v. Anwelt Shoe Mfg. Co. (C. C. A. 1st, 1937) 93 F. (2d) 367. See also § 745 et seq.

¹⁹ United States v. Idaho (1936) 298 U. S. 105, 80 L. Ed. 1070, 56 S. Ct. 690; Manufacturers R. Co. v. United States (1918) 246 U. S. 457, 62 L. Ed. 831, 38 S. Ct. 383.

party is not entitled to refuse to introduce evidence in a proceeding on the ground that the act is unconstitutional. He should try his case when called for hearing, taking proper steps to preserve constitutional questions, and thereafter should insist on their being heard and decided by the court having jurisdiction for judicial review.²⁰ Yet, in general, a party may wait until a law is passed or a regulation is made and then insist upon his constitutional rights. And where, for instance, the agency contends that a party is entitled to no compensation for certain property, to offer evidence as to it would be an idle form.²¹ Mere participation in an administrative hearing does not operate to waive constitutional rights.²²

Failure to object to evidence offered in administrative proceedings by an opposing party may permit an inference that such evidence can not operate to the injury of the party failing to object.²³

§ 168. Presumptions.

The same rules applicable to presumptions in judicial proceedings apply to presumptions in administrative proceedings.²⁴ Thus a presumption set forth in a statute for application in an administrative proceeding does not have the quality of affirmative evidence. The presumption only applies in the absence of evidence, and once evidence is introduced the presumption disappears.²⁵ An appellate agency, such as the Board of Tax Appeals, cannot rely wholly upon the presumption of correctness that attaches to the findings of the Commissioner, but must itself decide upon the evidence.²⁶ The validity of presumptions under the due process clause²⁷ and presumptions on judicial review are treated elsewhere.²⁸ Matters of evidence and presumptions are sometimes stipulated by statute.²⁹

²⁰ National Labor Relations Board v. Anwelt Shoe Mfg. Co. (C. C. A. 1st, 1937) 93 F. (2d) 367.

²¹ San Joaquin & K. R. Canal & Irrigation Co. v. County of Stanislaus (1914) 233 U. S. 454, 58 L. Ed. 1041, 34 S. Ct. 652. See also § 226 et seq.

²² National Labor Relations Board v. Anwelt Shoe Mfg. Co. (C. C. A. 1st, 1937) 93 F. (2d) 367.

²³ Lone Star Gas Co. v. Texas (1938) 304 U. S. 224, 82 L. Ed. 1304, 58 S. Ct. 883, rehearing denied 304 U. S. 590, 82 L. Ed. 1549, 58 S. Ct. 1051.

²⁴ Jones v. Securities & Exchange Commission (1936) 298 U. S. 1, 80 L. Ed. 1015, 56 S. Ct. 654; Del Vecchio v. Bowers (1935) 296 U. S. 280, 80 L. Ed. 229, 56 S. Ct. 190.

²⁵ Del Vecchio v. Bowers (1935) 296 U. S. 280, 80 L. Ed. 229, 56 S. Ct. 190.

²⁶ Nachod & United States Signal Co. v. Helvering (C. C. A. 6th, 1934) 74 F. (2d) 164.

²⁷ See § 301.

²⁸ See § 754.

²⁹ The Agricultural Adjustment Act, 7 USCA 649.

§ 169. Burden of Proof.

As in judicial proceedings the party seeking relief ordinarily has the burden of proof, even though that party be the administrative agency itself acting as prosecutor, judge and jury. The burden of proof is sometimes provided for by statute.³⁰ Administrative agencies do not have general authority to make regulations which shift the fundamental burden of proof or otherwise basically affect a judicial hearing prescribed by statute.³¹

§ 170. Judicial Notice.

An administrative agency has the right to take judicial notice of matters of common knowledge, coextensive with that of judicial tribunals.³² Neither a court nor an administrative agency may take judicial notice of the laws of a foreign country.³³

An agency must take judicial notice of its own records.³⁴ Thus, the Secretary of Labor must be charged with knowledge of the records of his department.³⁵ Whether judicial notice has been properly taken by the administrative agency is a judicial question.³⁶ Questions involving the taking of judicial notice by courts on judicial review are treated in the part dealing with judicial review.³⁷

§ 171. — Change in Economic Conditions.

An administrative agency has the power to take judicial notice of economic conditions of the year 1932, as an "abnormal year," supported by common knowledge of economic conditions of that time.³⁸ An administrative agency is bound to take judicial notice of a collapse of values in all classes of property, and to take into account and give

³⁰ The Agricultural Adjustment Act, 7 USCA 644.

³¹ *Petition of Warszawski* (D. C. E. D. Mich., S. Div., 1936) 16 F. Supp. 43 (Secy. of Labor).

³² *Ohio Bell Telephone Co. v. Public Utilities Commission* (1937) 301 U. S. 292, 81 L. Ed. 1093, 57 S. Ct. 724; *Great Northern R. Co. v. Weeks* (1936) 297 U. S. 135, 80 L. Ed. 532, 56 S. Ct. 426; *Strecker v. Kessler* (C. C. A. 5th, 1938) 95 F. (2d) 976. See Sibley, J., dissenting on rehearing in *Strecker v. Kessler* (C. C. A. 5th, 1938) 96 F. (2d) 1020, aff'd 307 U. S. 22, 83 L. Ed. 1082, 59 S. Ct. 694.

³³ *Smith v. Hays* (C. C. A. 8th,

1925) 10 F. (2d) 145.

³⁴ *Lancashire Shipping Co., Ltd. v. Elting* (C. C. A. 2d, 1934) 70 F. (2d) 699, cert. den. 293 U. S. 594, 79 L. Ed. 688, 55 S. Ct. 109.

³⁵ *Lancashire Shipping Co., Ltd. v. Elting* (C. C. A. 2d, 1934) 70 F. (2d) 699, cert. den. 293 U. S. 594, 79 L. Ed. 688, 55 S. Ct. 109.

³⁶ See § 433.

³⁷ See §§ 765, 766.

³⁸ *United Gas Public Service Co. v. Texas* (1938) 303 U. S. 123, 82 L. Ed. 702, 58 S. Ct. 483, rehearing denied 303 U. S. 667, 82 L. Ed. 1124, 58 S. Ct. —.

due weight to a decline in values of this character.³⁹ Administrative determinations have been invalidated because of failure to take judicial notice of enormous diminution in value of property.⁴⁰ Judicial notice must be taken of the degree of change in economic conditions where it is common knowledge that the degree of decline was greater or less than a particular percentage or standard.⁴¹

§ 172. Referenda.

A referendum is one method of gathering evidence, and, if the agency follows the rules laid down in the statute, may be the basis for the agency's determination.⁴²

§ 173. Failure to Use Interim Judicial Remedy to Adduce Evidence.

Failure to avail one's self of an interim judicial remedy for the taking of evidence, in the course of an administrative hearing, will prevent a party from later contending on judicial review that the agency acted arbitrarily in excluding the evidence which could have been otherwise adduced, even though the agency's error in excluding the evidence is obvious.⁴³

III. EXAMINERS; REPORTS AND EXCEPTIONS THERETO

§ 174. Examiners in General.

Many administrative schemes provide for hearings before employees or agents of the agency,⁴⁴ ordinarily called "examiners." An examiner's proposed report is a mere recommendation of an employee of an agency to the agency.⁴⁵ The function of an examiner is analogous

³⁹ *Great Northern R. Co. v. Weeks* (1936) 297 U. S. 135, 80 L. Ed. 532, 56 S. Ct. 426.

⁴⁰ *Great Northern R. Co. v. Weeks* (1936) 297 U. S. 135, 80 L. Ed. 532, 56 S. Ct. 426.

⁴¹ *Great Northern R. Co. v. Weeks* (1936) 297 U. S. 135, 80 L. Ed. 532, 56 S. Ct. 426.

⁴² *H. P. Hood & Sons, Inc. v. United States* (1939) 307 U. S. 588, 83 L. Ed. 1478, 59 S. Ct. 1019.

⁴³ *Consolidated Edison Co. v. National Labor Relations Board* (1938) 305 U. S. 197, 83 L. Ed. 126, 59 S. Ct. 206.

⁴⁴ E. g., the *National Labor Relations Act*, 29 USCA 151 et seq.; the *Radio Act*, 44 Stat. 1166 as amended, 45 Stat. 373, 45 Stat. 1554.

Federal Radio Commission v. Nelson Bros. Bond & Mtg. Co. (1933) 289 U. S. 266, 77 L. Ed. 1166, 53 S. Ct. 627, 89 A. L. R. 406.

See the *Final Report of the Attorney General's Committee on Administrative Procedure* (1941) p. 375 et seq.

⁴⁵ *Baltimore & O. R. Co. v. United States* (1936) 298 U. S. 349, 80 L. Ed. 1209, 56 S. Ct. 797; *Federal Radio Commission v. Nelson Bros. Bond &*

to that of an auditor or special master, and his report has similar weight.⁴⁶ It is better practice for an agency to direct an examiner to make a tentative report, with an opportunity for exceptions and argument upon the report.⁴⁷ The lack of an examiner's proposed report may bear upon the question of denial of procedural due process.⁴⁸ An examiner, referee or other agent of an agency designated to conduct a hearing, must obviously be impartial, and subject to the constitutional requirements of procedural due process.^{48a}

Mtg. Co. (1933) 289 U. S. 266, 77 L. Ed. 1166, 53 S. Ct. 627, 89 A. L. R. 406.

⁴⁶ *Unity School of Christianity v. Federal Radio Commission* (1933) 62 App. D. C. 52, 64 F. (2d) 550, cert. den. 292 U. S. 646, 78 L. Ed. 1496, 54 S. Ct. 779; *Woodmen of the World Life Ins. Ass'n v. Federal Radio Commission* (1933) 62 App. D. C. 138, 65

F. (2d) 484.

⁴⁷ For a valuable practical discussion of the form and content of examiners' or other intermediate reports, and final administrative decisions, see the Final Report of the Attorney General's Committee on Administrative Procedure, p. 436 et seq.

⁴⁸ See § 298.

^{48a} See §§ 274 et seq., 309.

CHAPTER 12

REPORT AND ORDER

- § 175. Presumption of Correct Determination from Evidence and Argument.
- § 176. Definiteness Essential.
- § 177. —Clerical Errors Unimportant.
- § 178. Inconsistencies Unimportant.
- § 179. Effect of Dissent by Members of Agency.
- § 180. Nature of Administrative Order: Analogy to Court Injunction.
- § 181. Agency's Stay of Order.
- § 182. Against Whom Orders May Run.

§ 175. Presumption of Correct Determination from Evidence and Argument.

Where a trial examiner's report is made to an agency, and even if there is no intermediate report by the examiner or oral argument before the agency, it must be assumed that an aggrieved party's brief was transmitted to the agency and that the agency considered the brief and the evidence and made its own findings in the light of that evidence and argument.¹

§ 176. Definiteness Essential.

The report and order of an agency constitute the only authoritative evidence of its action.² It is essential that administrative orders be definite and clear, their terms being so drawn as to preclude misapprehension.³ This is particularly important where the dominant federal authority is exerted to affect intrastate rates contrary to existing orders of the state authorities.⁴ Where an agency has issued two reports in the same proceeding, the subsequent report prevails as to matters in which they conflict.⁵

¹ Consolidated Edison Co. v. National Labor Relations Board (1938) 305 U. S. 197, 83 L. Ed. 126, 59 S. Ct. 206.

² Illinois Cent. R. Co. v. Public Utilities Commission (1918) 245 U. S. 493, 62 L. Ed. 425, 38 S. Ct. 170.

³ See American Express Co. v. South Dakota ex rel. Caldwell (1917) 244 U. S. 617, 61 L. Ed. 1352, 37 S. Ct. 656.

⁴ Illinois Cent. R. Co. v. Public Utilities Commission (1918) 245 U. S. 493, 62 L. Ed. 425, 38 S. Ct. 170; American Express Co. v. South Dakota ex rel. Caldwell (1917) 244 U. S. 617, 61 L. Ed. 1352, 37 S. Ct. 656.

⁵ Terminal Warehouse Co. of Baltimore City v. United States (D. C. Md., 1929) 31 F. (2d) 951.

§ 177. — Clerical Errors Unimportant.

Clerical errors and omissions in an order are not fatal, if by reference to other parts of the record the meaning is clear.⁶ Thus, the omission of descriptive words describing the petitioner to be a party as administrator rather than individually does not render an order of the Board of Tax Appeals void.⁷ Likewise, a mistake in the designation of the complainant in a cease and desist order of the Shipping Board is not fatal.⁸

§ 178. Inconsistencies Unimportant.

The doctrine of *stare decisis* does not apply to an administrative agency, and courts are not interested in inconsistencies in its different reports.⁹

§ 179. Effect of Dissent by Members of Agency.

The legal effect of an administrative report and order, from which a minority of the members of the agency dissent, is the same as if supported by all members of the agency.¹⁰ A strong dissent may, however, cast doubt as to whether basic findings were in fact made.¹¹

§ 180. Nature of Administrative Order: Analogy to Court Injunction.

An order of an administrative agency is ordinarily analogous to the judgment of a court,¹² granting an injunction or restraining

⁶ *Smith v. Commissioner of Internal Revenue* (C. C. A. 4th, 1933) 67 F. (2d) 167.

⁷ *Smith v. Commissioner of Internal Revenue* (C. C. A. 4th, 1933) 67 F. (2d) 167.

⁸ *Isthmian S. S. Co. v. United States* (D. C. S. D. N. Y., 1931) 53 F. (2d) 251.

⁹ *Glens Falls Portland Cement Co. v. Delaware & Hudson Co.* (D. C. S. D. N. Y. 1932) 55 F. (2d) 971, *aff'd* (C. C. A. 2d, 1933) 66 F. (2d) 490, *cert. den.* 290 U. S. 697, 78 L. Ed. 599, 54 S. Ct. 132.

Despite denial that the doctrine of *stare decisis* applies theoretically to administrative determinations, as a practical matter precedents obviously play a major role in the making of

such determinations. See William H. Pittman in "The Doctrine of Precedents and the Interstate Commerce Commission," (1937) 5 Geo. Wash. L. Rev. 543.

As to reliance upon precedents by administrative agencies, see the Final Report of the Attorney General's Committee on Administrative Procedure (1941) p. 466 et seq.

¹⁰ *Baltimore & O. R. Co. v. United States* (1936) 298 U. S. 349, 80 L. Ed. 1209, 56 S. Ct. 797.

¹¹ See § 573.

¹² *Chicago, R. I. & P. R. Co. v. United States* (1931) 284 U. S. 80, 76 L. Ed. 177, 52 S. Ct. 87; *Carolina Aluminum Co. v. Federal Power Commission* (C. C. A. 4th, 1938) 97 F. (2d) 435.

order,¹³ and may not be rightly issued by the agency or enforced by the court touching a matter not complained of or as to which the evidence shows neither a past nor a threatened wrongdoing.¹⁴ The Interstate Commerce Commission may annex to its orders appropriate conditions which relate to interstate commerce or to the rights and duties of a carrier engaged in such commerce.¹⁵

Findings constitute no part of a judicial judgment or decree, or of an administrative order, even though incorporated in the same instrument with it.¹⁶

§ 181. Agency's Stay of Order.

Under some statutes the agency has power to issue a stay of its original order, pending the outcome of a suit for judicial review thereof.¹⁷

§ 182. Against Whom Orders May Run.

Orders may be directed against any party to an administrative proceeding. A cease and desist order may also be directed to individuals in control of a corporate party, where the command to a corporation is a command to those who control it, who may be guilty of contempt for disobedience, and findings supported by substantial evidence show that individuals in control of the corporation may try to evade a cease and desist order indirectly,¹⁸ or where the evidence otherwise shows that it is necessary to include individuals who are the sole or principal corporate actors in order to make the order fully effective.¹⁹

¹³ *Globe Cotton Mills v. National Labor Relations Board* (C. C. A. 5th, 1939) 103 F. (2d) 91. See *Jones v. Securities & Exchange Commission* (1936) 298 U. S. 1, 80 L. Ed. 1015, 56 S. Ct. 654.

¹⁴ *Globe Cotton Mills v. National Labor Relations Board* (C. C. A. 5th, 1939) 103 F. (2d) 91.

¹⁵ *United States v. Chicago, M., St. P. & P. R. Co.* (1931) 282 U. S. 311, 75 L. Ed. 359, 51 S. Ct. 159.

¹⁶ *Carolina Aluminum Co. v. Federal Power Commission* (C. C. A. 4th, 1938) 97 F. (2d) 435.

¹⁷ *Tri-State Broadcasting Co. v. Federal Communications Commission* (1938) 68 App. D. C. 292, 96 F. (2d) 564.

¹⁸ *Federal Trade Commission v. Standard Education Society* (1937) 302 U. S. 112, 82 L. Ed. 141, 58 S. Ct. 113, rehearing denied 302 U. S. 779, 82 L. Ed. 602, 58 S. Ct. 365.

¹⁹ *Federal Trade Commission v. Standard Education Society* (1937) 302 U. S. 112, 82 L. Ed. 141, 58 S. Ct. 113, rehearing denied 302 U. S. 779, 82 L. Ed. 602, 58 S. Ct. 365.

CHAPTER 13

REOPENING, REHEARING, REARGUMENT AND RECONSIDERATION

- § 183. Reopening and Reconsideration Part of the Legislative Process.
- § 184. When Rehearing Application May Be Made.
- § 185. Right to Rehearing.
- § 186. Duty to Reopen.

§ 183. Reopening and Reconsideration Part of the Legislative Process.

The phrase for reconsideration of a decision by a court is "rehearing" or "reargument," and is ordinarily limited to facts or points overlooked or misapprehended in an opinion already issued, or the intervention of a controlling decision. An administrative proceeding, however, may be "reopened"¹ and "reconsidered." This means reconsideration of the entire case *de novo*, in the legislative sense, for further completion of the legislative process, free from principles of *stare decisis* and *res judicata* which apply only to judicial proceedings.² An administrative agency is always required to reach the conclusion which the evidence justifies, regardless of prior determinations³ between the same⁴ or different⁵ parties, especially where there is evidence of new conditions. Hence an administrative agency is not estopped to redetermine an administrative question in a particular way, by a previous decision of the identical question to the contrary.⁶ Orders, such as orders of the Interstate Commerce Commission, are not grants in perpetuity. Parties do not acquire vested rights. Necessarily implied in each order is the term "until other-

¹ *Skinner & Eddy Corp. v. United States* (1919) 249 U. S. 557, 63 L. Ed. 772, 39 S. Ct. 375. See *United States v. Northern Pac. R. Co.* (1933) 288 U. S. 490, 77 L. Ed. 914, 53 S. Ct. 406.

² See § 255.

³ *St. Joseph Stock Yards Co. v. United States* (1936) 298 U. S. 38, 80 L. Ed. 1033, 56 S. Ct. 720.

⁴ *Northern Pac. R. Co. v. United States* (D. C. Minn. 1932) 60 F. (2d) 302, rev'd (1933) 288 U. S. 490, 77 L. Ed. 914, 53 S. Ct. 406.

⁵ *United States v. American Sheet & Tin Plate Co.* (1937) 301 U. S. 402, 81 L. Ed. 1186, 57 S. Ct. 804.

⁶ *United States v. American Sheet & Tin Plate Co.* (1937) 301 U. S. 402, 81 L. Ed. 1186, 57 S. Ct. 804; *St. Joseph Stock Yards Co. v. United States* (1936) 298 U. S. 38, 80 L. Ed. 1033, 56 S. Ct. 720. See *Froebert-Norfleet, Inc. v. Southern Ry. Co.* (D. C. N. D. Ga., 1934) 9 F. Supp. 409. See also § 255.

wise ordered by the Commission," and the original application proceedings are always subject to be reopened.⁷

§ 184. When Rehearing Application May Be Made.

Where there is no statutory provision, the time within which a party may move for a rehearing may be set by the agency's procedural rules.⁸ Such rules need not limit a rehearing where the proceeding is reopened on the agency's own motion.⁹

§ 185. Right to Rehearing.

Ordinarily, any party aggrieved by an administrative order may petition for a rehearing.¹⁰ Whether the agency has power to grant a rehearing depends upon the statutes establishing it and defining its powers.¹¹ In the absence of statutory provisions the grounds for an administrative rehearing, the terms on which a petition for rehearing is to be granted, and the effect of filing such petition should be controlled by the agency's regulations or rules of practice.¹² A consistent practice respecting the granting of such petitions may constitute a general rule.¹³ Where it is believed that the agency erred in its findings because important evidence was not brought to its attention, the appropriate remedy is to apply for a rehearing.¹⁴ Where an order is set aside on judicial review for lack of proper findings, an agency is free to consider the facts anew and, if warranted, file an equivalent order in proper form.¹⁵

Where a petitioner can show that economic conditions have so altered between the hearing and the effective date of an order based on findings in that hearing that the evidence there taken does not

⁷ *Skinner & Eddy Corp. v. United States* (1919) 249 U. S. 557, 63 L. Ed. 772, 39 S. Ct. 375.

⁸ *Froeber-Norfleet, Inc. v. Southern Ry. Co.* (D. C. N. D. Ga., 1934) 9 F. Supp. 409.

⁹ *Froeber-Norfleet, Inc. v. Southern Ry. Co.* (D. C. N. D. Ga., 1934) 9 F. Supp. 409.

¹⁰ *Black River Valley Broadcasts, Inc. v. McNinch* (1938) 69 App. D. C. 311, 101 F. (2d) 235, cert. den. (1939) 307 U. S. 623, 83 L. Ed. 1501, 59 S. Ct. 793.

¹¹ *Helvering v. Continental Oil Co.* (1933) 63 App. D. C. 5, 68 F. (2d) 750, cert. den. 292 U. S. 627, 78 L.

Ed. 1481, 54 S. Ct. 629.

¹² *Helvering v. Continental Oil Co.* (1933) 63 App. D. C. 5, 68 F. (2d) 750, cert. den. 292 U. S. 627, 78 L. Ed. 1481, 54 S. Ct. 629.

¹³ *Helvering v. Continental Oil Co.* (1933) 63 App. D. C. 5, 68 F. (2d) 750, cert. den. 292 U. S. 627, 78 L. Ed. 1481, 54 S. Ct. 629.

¹⁴ *Tagg Bros. & Moorhead v. United States* (1930) 280 U. S. 420, 74 L. Ed. 524, 50 S. Ct. 220.

¹⁵ *Atlantic Coast Line R. Co. v. Florida* (1935) 295 U. S. 301, 79 L. Ed. 1451, 55 S. Ct. 713, rehearing denied 295 U. S. 769, 79 L. Ed. 1710, 55 S. Ct. 911.

supply a true foundation for the order, the agency should order a rehearing.¹⁶ Thus administrative refusal to grant a rehearing may be tested on judicial review under orthodox criteria for ascertainment of arbitrary conduct, and the facts will be scrutinized by the court.¹⁷ But there is no necessity for a rehearing where the change in economic conditions has been insignificant,¹⁸ and granting a rehearing would disenable an agency to protect the interest of the public, when protection of such interest is one of its statutory duties.¹⁹

§ 186. Duty to Reopen.

There is no general duty imposed upon an administrative agency to reopen a proceeding, and in the absence of controlling circumstances an administrative failure to reopen a proceeding is no ground for invalidating the agency's determination.²⁰ A request to reopen an administrative proceeding must show a specific purpose therefor; and a mere broad request may be refused by the agency without abuse of discretion.²¹ However, it is an agency's duty to reopen a proceeding by rehearing or new proceedings if newly discovered evidence shown to exist may warrant a different disposition of the case.²²

When an administrative agency is performing special functions in the conferring of a government gratuity, its determinations may be non-reviewable and non-reopenable since the parties involved have no legal rights. This will depend strictly on the statute establishing the special functions.²³

¹⁶ *United States v. Northern Pac. R. Co.* (1933) 288 U. S. 490, 77 L. Ed. 914, 53 S. Ct. 406; *Atchison, T. & S. F. R. Co. v. United States* (1932) 284 U. S. 248, 76 L. Ed. 273, 52 S. Ct. 146.

¹⁷ *United States v. Northern Pac. R. Co.* (1933) 288 U. S. 490, 77 L. Ed. 914, 53 S. Ct. 406; *United States ex rel. Maine Potato Growers & Shippers Ass'n v. Interstate Commerce Commission* (1937) 66 App. D. C. 398, 88 F. (2d) 780, cert. den. 300 U. S. 684, 81 L. Ed. 886, 57 S. Ct. 754.

¹⁸ *Northern Pac. R. Co. v. United States* (D. C. Minn., 1932) 60 F. (2d) 302, rev'd (1933) 288 U. S. 490, 77 L.

Ed. 914, 53 S. Ct. 406.

¹⁹ *United States v. Northern Pac. R. Co.* (1933) 288 U. S. 490, 77 L. Ed. 914, 53 S. Ct. 406.

²⁰ *St. Joseph Stock Yards Co. v. United States* (1936) 298 U. S. 38, 80 L. Ed. 1033, 56 S. Ct. 720.

²¹ *United States v. Northern Pac. R. Co.* (1933) 288 U. S. 490, 77 L. Ed. 914, 53 S. Ct. 406.

²² *Tagg Bros. & Moorhead v. United States* (1930) 280 U. S. 420, 74 L. Ed. 524, 50 S. Ct. 220.

²³ *Butte, Anaconda & Pacific R. Co. v. United States* (1933) 290 U. S. 127, 78 L. Ed. 222, 54 S. Ct. 108.

BOOK III

JUDICIAL REVIEW

PART I

THE RIGHT TO JUDICIAL REVIEW

CHAPTER 14

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§ 187. Introduction.

The right to judicial review must be distinguished from questions as to whether a particular type of administrative order is reviewable under a particular statute in the jurisdiction of a particular court. The latter type of question is purely one of statutory construction, transcended by the broader constitutional question as to the fundamental right to judicial review. Thus a party may have standing to sue yet not be able to come within the jurisdiction of a particular court.¹ A particular type of order may not be reviewable under a particular statute in a particular court or a court constituted in a particular way, yet be reviewable, for instance, under the general equity jurisdiction of a one judge federal district court.² This chapter deals only with the right to judicial review of administrative action, irrespective of questions of jurisdiction.³ The question of right to judicial review is a question which is basic to questions of jurisdiction, and in the last analysis is a constitutional question.

I. BASIS OF RIGHT TO JUDICIAL REVIEW: LEGAL RIGHTS MUST BE AFFECTED

§ 188. Right to Judicial Review Only Where Legal Rights Affected.

We have seen that the doctrine of separation of powers under which the judicial power is vested in the courts, based upon the common-law foundation of the supremacy of law itself, is responsible for the doctrine of judicial review.⁴ Resting upon this constitutional base is

¹ See § 615 et seq.

² See § 650.

³ See § 615 et seq., on jurisdiction.

⁴ See § 3 and § 41 et seq.

⁵ Federal Communications Commission.

Federal Communications Commission v. Sanders Bros. Radio Station (1940) 309 U. S. 470, 84 L. Ed. 869, 60 S. Ct. 693, rehearing denied 309 U. S. 642, 698, 84 L. Ed. 1037, 60 S. Ct. 693; Tri-State Broadcasting Co. v.

Federal Communications Commission (1939) 71 App. D. C. 157, 107 F. (2d) 956; Yankee Network, Inc. v. Federal Communications Commission (1939) 71 App. D. C. 11, 109 F. (2d) 212; Woodmen of the World Life Ins. Society v. Federal Communications Commission (1939) 70 App. D. C. 196, 105 F. (2d) 75, cert. den. 308 U. S. 588, 84 L. Ed. 492, 60 S. Ct. 112. See Sunshine Broadcasting Co. v. Fly (D. C. D. C. 1940) 33 F. Supp. 560.

the rule that a party has legal standing to bring judicial review only where he is aggrieved, that is, where the administrative action complained of adversely affects his legal rights.⁵ Also there must be no

Interstate Commerce Commission.

Moffat Tunnel League v. United States (1933) 289 U. S. 113, 77 L. Ed. 1069, 53 S. Ct. 543; *Pittsburgh & W. Va. R. Co. v. United States* (1930) 281 U. S. 479, 74 L. Ed. 980, 50 S. Ct. 378; *Alexander Sprunt & Son v. United States* (1930) 281 U. S. 249, 74 L. Ed. 832, 50 S. Ct. 315; *Edward Hines Yellow Pine Trustees v. United States* (1923) 263 U. S. 143, 68 L. Ed. 216, 44 S. Ct. 72; *Chesapeake & O. R. Co. v. United States* (D. C. E. D. Va., 1933) 5 F. Supp. 7.

The President.

United States v. George S. Bush & Co., Inc. (1940) 310 U. S. 371, 84 L. Ed. 1259, 60 S. Ct. 944.

Railroad Labor Board.

Pennsylvania Railroad System, etc., Federation v. Pennsylvania R. Co. (1925) 267 U. S. 203, 69 L. Ed. 574, 45 S. Ct. 307; *Pennsylvania R. Co. v. United States Railroad Labor Board* (1923) 261 U. S. 72, 67 L. Ed. 536, 43 S. Ct. 278.

Secretary of Labor.

Perkins v. Lukens Steel Co. (1940) 310 U. S. 113, 84 L. Ed. 1108, 60 S. Ct. 869.

State Agencies.

Texport Carrier Corp. v. Smith (D. C. S. D. Tex., Austin Div., 1934) 8 F. Supp. 28.

Quotations.

"But plaintiffs could not maintain this suit merely by showing (if true) that the Commission was without power to order the penalty charges canceled. They must show also that the order alleged to be void subjects them to legal injury, actual or threatened. This they have wholly failed to do." (Mr. Justice Brandeis in *Edward Hines Yellow Pine Trustees v. United States* (1923) 263 U. S. 143, 148, 68 L. Ed. 216, 44 S. Ct. 72.)

"The Act does not specify the classes of persons, natural or artificial, who may sue, or what shall constitute a cause of action for the setting aside of an order. But it does require that the petition shall set forth 'the facts constituting petitioner's cause of action,' and by other provisions shows that for failure so to do the suit shall be dismissed. Id. § 45. Consequently the complaint must show that plaintiff has, or represents others having, a legal right or interest that will be injuriously affected by the order. *Edward Hines Trustees v. United States*, 263 U. S. 143, 148. *Sprunt & Son v. United States*, 281 U. S. 249, 254. *Pittsburgh & W. Va. Ry. v. United States*, 281 U. S. 479, 486. Plaintiffs have failed to show that they are so qualified. Their interest is not a legal one. It is no more than a sentiment, such as may be entertained by members of the public in the territory west of Craig, that the improvement of transportation facilities authorized by the Commission will lessen the possibility of construction by a rival of the Rio Grande of an extension of the Moffat to Utah common points. Cf. *Interstate Commerce Commission v. Oregon-Washington Co.*, 288 U. S. 14." (Mr. Justice Butler in *Moffat Tunnel League v. United States* (1933) 289 U. S. 113, 119, 77 L. Ed. 1069, 53 S. Ct. 543.)

"What the complainants here are seeking to do is to enforce by mandatory injunction a compliance with a decision of the Board, not based on the legal rights of the parties, but on its judgment as to what legal rights the disputants should surrender or abate in the public interest of each other, to maintain harmonious

prior judicial decision which is *res judicata* of the controversy.⁶ It is not enough that the agency was without power to make the order.⁷ Where private rights are not affected, judicial interpretations of law at the instance of those who show no more than a mere possible injury to the public, would be improper. To have standing in court a party must show an injury or threat to a particular right of his own, as distinguished from the public interest in the administration of the law.⁸ Neither damage nor loss of income in consequence of the government, which is not an invasion of recognized legal rights, is in itself a source of legal rights in the absence of constitutional legislation recognizing it as such.⁹ Hence a party seeking judicial review must show in his complaint that he has, or represents others who have, a legal right or interest that will be injuriously affected by the order.¹⁰ The right must be subjected to or threatened with a legal wrong.¹¹

Thus it is said that a party must be aggrieved¹² or adversely af-

relations between them necessary to the continuance of interstate commerce, and to avoid severing those relations as they would have the strict legal right to do. Such a remedy by injunction in a court, it was not the intention of Congress to provide." (Mr. Chief Justice Taft in *Pennsylvania Railroad System, etc., Federation v. Pennsylvania R. Co.* (1925) 267 U. S. 203, 216, 69 L. Ed. 574, 45 S. Ct. 307).

⁶ *Grubb v. Public Utilities Commission of Ohio* (1930) 281 U. S. 470, 74 L. Ed. 972, 50 S. Ct. 374.

⁷ *Edward Hines Yellow Pines Trustees v. United States* (1923) 263 U. S. 143, 68 L. Ed. 216, 44 S. Ct. 72.

⁸ *Perkins v. Lukens Steel Co.* (1940) 310 U. S. 113, 84 L. Ed. 1108, 60 S. Ct. 869.

⁹ *Perkins v. Lukens Steel Co.* (1940) 310 U. S. 113, 84 L. Ed. 1108, 60 S. Ct. 869.

¹⁰ *Moffat Tunnel League v. United States* (1933) 289 U. S. 113, 77 L. Ed. 1069, 53 S. Ct. 543.

¹¹ *Alexander Sprunt & Son v. United States* (1930) 281 U. S. 249, 74 L. Ed. 832, 50 S. Ct. 315; *Pittsburgh & W.*

Va. R. Co. v. United States (1930) 281 U. S. 479, 74 L. Ed. 980, 50 S. Ct. 378; *Edward Hines Yellow Pine Trustees v. United States* (1923) 263 U. S. 143, 68 L. Ed. 216, 44 S. Ct. 72.
¹² **Federal Communications Commission.**

Federal Communications Commission v. Sanders Bros. Radio Station (1940) 309 U. S. 470, 84 L. Ed. 869, 60 S. Ct. 693, rehearing denied 309 U. S. 642, 698, 84 L. Ed. 1037, 60 S. Ct. 693; *Ward v. Federal Communications Commission* (1939) 71 App. D. C. 166, 108 F. (2d) 486; *Tri-State Broadcasting Co. v. Federal Communications Commission* (1939) 71 App. D. C. 157, 107 F. (2d) 956; *Pulitzer Pub. Co. v. Federal Communications Commission* (1937) 68 App. D. C. 124, 94 F. (2d) 249.

Federal Power Commission.

Federal Power Commission v. Pacific Power & Light Co. (1934) 307 U. S. 156, 159, 83 L. Ed. 1180, 59 S. Ct. 766.

Federal Radio Commission.

Symons Broadcasting Co. v. Federal Radio Commission (1933) 62 App. D. C. 46, 64 F. (2d) 381.

affected¹³ by the administrative action complained of in order to have standing to assail it judicially. If a party's legal rights are not affected by the administrative action, he has no right to bring judicial review, and the validity of administrative action will not be determined upon his mere complaint. For instance, a party attacking a rate order must have a pecuniary interest in rates promulgated.¹⁴

Administrative action which may affect one's legal rights includes orders,¹⁵ findings,¹⁶ and rules and regulations.¹⁷ An order of the Interstate Commerce Commission which merely removes obstacles to the establishment of new rates by a railroad without prescribing them, or closing the door to attack on particular rates by individual shippers, is not reviewable, without further administrative action, by one of a group of shippers affected.¹⁸

§ 189. Examples.

The right to use a state's highways for interstate commerce is a right, violation of which by a state agency gives an appropriate party legal standing to attack an administrative order affecting that right.¹⁹ Seniority rights of a railroad switchtender are legal rights which give legal standing to attack an administrative order affecting them.²⁰ A railroad complaining that an order of the Interstate Commerce

Securities and Exchange Commission.

Lawless v. Securities & Exchange Commission (C. C. A. 1st, 1939) 105 F. (2d) 574.

13 Federal Communications Commission.

Rochester Telephone Corp. v. United States (1939) 307 U. S. 125, 130, 83 L. Ed. 1147, 59 S. Ct. 754.

Interstate Commerce Commission.

Youngstown Sheet & Tube Co. v. United States (1935) 295 U. S. 476, 79 L. Ed. 1553, 55 S. Ct. 822; Piedmont & N. R. Co. v. United States (1930) 280 U. S. 469, 74 L. Ed. 551, 50 S. Ct. 192; The Chicago Junction Case (1924) 264 U. S. 258, 68 L. Ed. 667, 44 S. Ct. 317; Claiborne-Annapolis Ferry Co. v. United States (1932) 285 U. S. 382, 76 L. Ed. 808, 52 S. Ct. 440.

Secretary of Agriculture.

Green Valley Creamery Co., Inc. v. United States (C. C. A. 1st, 1939) 108 F. (2d) 342.

¹⁴ Youngstown Sheet & Tube Co. v. United States (1935) 295 U. S. 476, 79 L. Ed. 1553, 55 S. Ct. 822; Hollis v. Kutz (1921) 255 U. S. 452, 65 L. Ed. 727, 41 S. Ct. 371.

¹⁵ See § 195 et seq.

¹⁶ See § 206.

¹⁷ See § 207.

¹⁸ Algoma Coal & Coke Co. v. United States (D. C. E. D. Va. 1935) 11 F. Supp. 487 (ICC); Birmingham Slag Co. v. United States (D. C. N. D. Ala., S. Div., 1935) 11 F. Supp. 486.

¹⁹ Texport Carrier Corp. v. Smith (D. C. S. D. Tex., Austin Div., 1934) 8 F. Supp. 28 (state agency).

²⁰ Griffin v. Chicago Union Station Co. (D. C. N. D. Ill., E. Div., 1936)

Commission, directing it to keep its accounts in a particular manner, denies its right to maintain its equipment out of earnings, has standing to review the order, even in the absence of immediate pecuniary or other damage.²¹

But a wage determination by the Secretary of Labor under the Public Contracts Act²² contemplates no controversy between parties and no fixing of private rights. All the Act contemplates is to instruct agents of the government to fix terms and conditions for purchase of goods.²³ And no one has a legal right to any rate of duty. Hence whatever the legislature or President does concerning it raises no question of law, and the judgment of an administrative agency as to the existence of the facts calling for that action is not subject to judicial review.²⁴

§ 190. — Affecting a Competitive Advantage Insufficient.

The right affected must be an independent legal right, not merely the retraction of a competitive advantage formerly enjoyed.²⁵ If

13 F. Supp. 722 (Railroad Adjustment Board).

²¹ Chesapeake & O. R. Co. v. United States (D. C. E. D. Va. 1933) 5 F. Supp. 7 (ICC).

²² 41 USCA 35-45.

²³ Perkins v. Lukens Steel Co. (1940) 310 U. S. 113, 84 L. Ed. 1108, 60 S. Ct. 869.

²⁴ United States v. George S. Bush & Co., Inc. (1940) 310 U. S. 371, 84 L. Ed. 1259, 60 S. Ct. 944.

²⁵ Interstate Commerce Commission.

Alexander Sprunt & Son v. United States (1930) 281 U. S. 249, 74 L. Ed. 832, 50 S. Ct. 315; Atchison, T. & S. F. R. Co. v. United States (1929) 279 U. S. 768, 73 L. Ed. 947, 49 S. Ct. 494; Edward Hines Yellow Pines Trustees v. United States (1923) 263 U. S. 143, 68 L. Ed. 216, 44 S. Ct. 72; Indian Valley R. Co. v. United States (D. C. N. D. Cal., S. Div., 1931) 52 F. (2d) 485, aff'd 292 U. S. 608, 78 L. Ed. 1469, 54 S. Ct. 775; Merchant Truckmen's Bureau of New York v. United States (D. C. S. D. N. Y. 1936) 16 F. Supp. 998; *Algoma Coal & Coke Co. v.

United States (D. C. E. D. Va. 1935) 11 F. Supp. 487. See Delaware & H. R. Corp. v. United States (D. C. M. D. Pa. 1937) 19 F. Supp. 700.

"We are of opinion that appellants have no standing, in their own right, to make this attack. In so far as the order directs elimination of the rate differential previously existing, it worsened the economic position of the appellants. It deprived them of an advantage over other competitors of almost 3.5 cents per hundred pounds. The enjoyment of this advantage gave them a distinct interest in the proceeding before the Commission under § 3 of the Interstate Commerce Act. For, their competitive advantage was threatened. Having this interest, they were entitled to intervene in that administrative proceeding. And if they did so, they became entitled under § 212 of the Judicial Code to intervene, as of right, in any suit 'wherein is involved the validity' of the order entered by the Commission. But that interest alone did not give them the right to maintain an inde-

shippers receive reasonable service, pay reasonable rates, and suffer no unjust discrimination, they cannot complain of the rate or practice enjoyed by their competitors, or the retraction of a competitive advantage to which they are not otherwise entitled.²⁶ The advantage is merely an incident of, and hence dependent upon, the right, if any, of the carriers to maintain the former tariff in force, and their continuing desire to do so.²⁷ Where a carrier contends that it is seeking to acquire control of another carrier which is affected by the order attacked and that the Interstate Commerce Commission has allocated it and the other carrier to one system, in its plan for consolidation of the railroads, these vague speculative interests are clearly insufficient to give an independent standing to sue.²⁸ An order granting a radio broadcasting permit which affects the complainant's former mileage-separation standards only, in the absence of a showing that this will actually interfere with its broadcasting, does not affect his legal rights.²⁹

§ 191. — Speculative Interest Insufficient.

Mere speculative, hypothetical or conjectural interests do not result in affectation of one's legal rights, and do not give one a right to judicial review.³⁰ The claim that an order which does not deal with the interests of investors threatens a carrier's financial security, and

pendent suit, to vacate and set aside the order. Such a suit can be brought by a shipper only where a right of his own is alleged to have been violated by the order. And his independent right to relief is no greater where by intervention or otherwise he has become a party to the proceeding before the Commission or to a suit brought by a carrier. In the case at bar, the appellants have no independent right which is violated by the order to cease and desist. They are entitled as shippers only to reasonable service at reasonable rates and without unjust discrimination. If such service and rates are accorded them, they cannot complain of the rate or practice enjoyed by their competitors or of the retraction of a competitive advantage to which they are not otherwise entitled." (Mr. Justice Brandeis in *Alexander*

Sprunt & Son v. United States (1930) 281 U. S. 249, 254, 255, 74 L. Ed. 832, 50 S. Ct. 315.)

²⁶ *Alexander Sprunt & Son v. United States* (1930) 281 U. S. 249, 74 L. Ed. 832, 50 S. Ct. 315.

²⁷ *Alexander Sprunt & Son v. United States* (1930) 281 U. S. 249, 74 L. Ed. 832, 50 S. Ct. 315.

²⁸ *Pittsburgh & W. Va. R. Co. v. United States* (1930) 281 U. S. 479, 74 L. Ed. 980, 50 S. Ct. 378.

²⁹ *Woodmen of the World Life Ins. Society v. Federal Communications Commission* (1939) 70 App. D. C. 196, 105 F. (2d) 75, cert. den. 308 U. S. 588, 84 L. Ed. 492, 60 S. Ct. 112.

³⁰ *Electric Bond & Share Co. v. Securities & Exchange Commission* (1938) 303 U. S. 419, 82 L. Ed. 936, 58 S. Ct. 678, 115 A. L. R. 105.

therefore threatens a party's financial interest as a minority stockholder, is not sufficient to show a threat of the legal injury necessary to entitle it to bring a suit to set aside the order.³¹ One who merely contemplated applying for a permit to establish a radio station in a certain locality, has no legal standing to review an order granting such an application to another.³² A mere sentimental interest on the part of members of the public in a territory to the effect that an improvement authorized upon one line by the Interstate Commerce Commission will lessen the possibility of extension by a rival line into that territory, is insufficient.³³ Likewise an objection that an order of the Interstate Commerce Commission unconstitutionally prefers the ports of one state over those of another cannot avail a private citizen whom the alleged preference does not personally concern.³⁴ One who refused to comply with conditions set up in an order, and thereby failed to accept rights or benefits under it, has no standing to review an order vacating that order and reestablishing an earlier one.³⁵

§ 192. Intervention in Administrative Proceedings Inconclusive.

The fact that one has been a party to an administrative proceeding does not necessarily demonstrate that his legal rights have been affected by a resultant order. Parties to administrative proceedings have legal standing to sue in the courts only if the traditional criteria are satisfied,³⁶ or one is granted the right to do so by statute. The question whether legal rights are affected is a judicial question which cannot be settled by administrative leave to intervene or by the presence of a statutory right to intervene in an administrative proceeding. Not every interest made sufficient by statute to entitle one to become a party to an administrative proceeding and to receive the legislative consideration there involved, such as a competitive economic advantage which a change in rates would destroy,³⁷ will be

³¹ *Pittsburgh & W. Va. R. Co. v. United States* (1930) 281 U. S. 479, 74 L. Ed. 980, 50 S. Ct. 378.

³² *Telegraph Herald Co. v. Federal Radio Commission* (1933) 62 App. D. C. 240, 66 F. (2d) 220.

³³ *Moffat Tunnel League v. United States* (1933) 289 U. S. 113, 77 L. Ed. 1069, 53 S. Ct. 543.

³⁴ *Avent v. United States* (1924) 266 U. S. 127, 69 L. Ed. 202, 45 S. Ct. 34.

³⁵ *Universal Service Wireless, Inc. v. Federal Radio Commission* (1930) 59 App. D. C. 319, 41 F. (2d) 113.

³⁶ *The Chicago Junction Case* (1924) 264 U. S. 258, 68 L. Ed. 667, 44 S. Ct. 317; *Merchant Truckmen's Bureau of New York v. United States* (D. C. S. D. N. Y. 1936) 16 F. Supp. 998.

³⁷ *Alexander Sprunt & Son v. United States* (1930) 281 U. S. 249, 74 L. Ed. 832, 50 S. Ct. 315; *Youngs-*

sufficient to give one standing to maintain an independent suit invoking the judicial power, to vacate or set aside an administrative order.³⁸ This rule applies even though also, under the statute, the exercise of such right entitles the party, as of right, to intervene in any suit wherein is involved the validity of the agency's order resulting from those proceedings.³⁹ Thus where an order directing the elimination of a previous rate differential worsened the economic position of shippers, by depriving them of an advantage over other competitors, they had a distinct interest entitling them to intervene in the proceeding before the Interstate Commerce Commission, and consequently to intervene in the suit attacking the order. But that interest alone did not give the right to maintain an independent suit attacking the order.⁴⁰ Such a suit can be brought by a shipper only where a right of his own is alleged to have been violated by the order. And his independent right to relief is no greater where, by intervention or otherwise, he has become a party to the proceeding before the Commission or to a suit brought by a carrier.⁴¹ The mere fact, for instance, that a carrier's lines connect with another's at Pittsburgh, does not entitle it, although permitted to intervene before the Interstate Commerce Commission, to bring suit as a connecting carrier to set aside an order granting the other carrier a certificate of convenience and necessity regarding terminal facilities in Cleveland, when the carrier's own lines do not extend to Cleveland, and there is no suggestion that the order can affect it as a carrier.⁴² Similarly there is no interest sufficient to sue where there is no more than a sentiment,

town Sheet & Tube Co. v. United States (D. C. Ohio, 1934) 7 F. Supp. 33, aff'd (1935) 295 U. S. 476, 79 L. Ed. 1553, 55 S. Ct. 822, rehearing denied 296 U. S. 661, 80 L. Ed. 471, 56 S. Ct. 81.

³⁸ Interstate Commerce Commission.

Moffat Tunnel League v. United States (1933) 289 U. S. 113, 77 L. Ed. 1069, 53 S. Ct. 543; Pittsburgh & W. Va. R. Co. v. United States (1930) 281 U. S. 479, 74 L. Ed. 980, 50 S. Ct. 378; Alexander Sprunt & Son v. United States (1930) 281 U. S. 249, 74 L. Ed. 832, 50 S. Ct. 315; Youngstown Sheet & Tube Co. v. United States (D. C. Ohio, 1934) 7 F. Supp. 33, aff'd (1935) 295 U. S. 476, 79 L. Ed. 1553, 55 S. Ct. 822,

rehearing denied 296 U. S. 661, 80 L. Ed. 471, 56 S. Ct. 81.

Securities and Exchange Commission.

Lawless v. Securities & Exchange Commission (C. C. A. 1st, 1939) 105 F. (2d) 574.

³⁹ Alexander Sprunt & Son v. United States (1930) 281 U. S. 249, 74 L. Ed. 832, 50 S. Ct. 315.

⁴⁰ Alexander Sprunt & Son v. United States (1930) 281 U. S. 249, 74 L. Ed. 832, 50 S. Ct. 315.

⁴¹ Alexander Sprunt & Son v. United States (1930) 281 U. S. 249, 74 L. Ed. 832, 50 S. Ct. 315.

⁴² Pittsburgh & W. Va. R. Co. v. United States (1930) 281 U. S. 479, 74 L. Ed. 980, 50 S. Ct. 378.

such as may be entertained by members of the public in a territory that an improvement authorized by an order of the Interstate Commerce Commission upon one line will lessen the possibility of extension by a rival line into that territory, although by statute it justified intervention in the administrative proceedings.⁴³

Yet it may be provided by statute that the fact of intervention in administrative proceedings gives one standing to bring judicial review of the resulting order in the courts.⁴⁴

§ 193. Lack of Intervention in Administrative Proceedings Inconclusive.

Conversely, where a party's legal rights are affected by administrative action, his right to judicial review is not diminished by the fact that he was not a party to the administrative proceedings in question.⁴⁵ For instance, where an order granting A a license for a radio broadcasting station will produce electrical interference with the station of B, who was not a party to the administrative proceeding resulting in grant of the license, B may nevertheless bring judicial review.⁴⁶

§ 194. Right to Intervene on Judicial Review Inconclusive.

A party in interest to proceedings before the Interstate Commerce Commission in which an order is made may appear and be heard in a suit involving the validity of the order and the interest of the party. Communities and others mentioned, who are interested in the controversy or question may intervene at any time after the institution of the suit.⁴⁷ These rights are to be distinguished from the independent right to bring suit to set aside an order, which exists only where there is capacity to sue, and the plaintiff's own legal right or interest is alleged to have been violated or affected by the order.⁴⁸ A carrier

⁴³ *Moffat Tunnel League v. United States* (1933) 289 U. S. 113, 77 L. Ed. 1069, 53 S. Ct. 543.

⁴⁴ 28 USCA 45a. *The Chicago Junction Case* (1924) 264 U. S. 258, 68 L. Ed. 667, 44 S. Ct. 317.

⁴⁵ *Edward Hines Yellow Pine Trustees v. United States* (1923) 263 U. S. 143, 68 L. Ed. 216, 44 S. Ct. 72; *Hollis v. Kutz* (1921) 225 U. S. 452, 65 L. Ed. 727, 41 S. Ct. 371. See *United States v. Pan*

American Petroleum Corp. (1938) 304 U. S. 156, 82 L. Ed. 1262, 58 S. Ct. 771; *The Chicago Junction Case* (1924) 264 U. S. 258, 68 L. Ed. 667, 44 S. Ct. 317.

⁴⁶ *Ward v. Federal Communications Commission* (1939) 71 App. D. C. 166, 108 F. (2d) 486.

⁴⁷ 28 USCA 45a.

⁴⁸ *Moffat Tunnel League v. United States* (1933) 289 U. S. 113, 77 L. Ed. 1069, 53 S. Ct. 543; *Alexander Sprunt*

may be a party in interest in a valuation proceeding before the Commission, have administrative remedies for the correction of errors in valuation, and may bring mandamus to compel the Commission to make a finding on every prescribed subject. But its interest is so remote and speculative that a court will not entertain a suit to review the valuation.⁴⁹

II. RIGHT TO REVIEW ORDERS

§ 195. Orders Generally Required.

Ordinarily administrative action is expressed by a sanction set forth in an order, and hence administrative orders are the ordinary subject of judicial review. Neither the utterances, nor the processes of reasoning of the Commission, as distinguished from its acts, are a subject for injunction.⁵⁰ Where the agency's report states that certain allowances are unlawful, but the question was only incidentally raised before the agency, no order was made regarding the allowances, and they were not specifically referred to in the order, the court will not act upon the allegation that the prohibition of the allowances should be enjoined as arbitrary.⁵¹ If the complaining party is entitled to such allowances, he can enforce his demand by appropriate proceedings before the agency and the courts. In such proceedings specific issues will be presented and decided.⁵² Similarly, a suit for damages against a carrier, for unjust charges, cannot be based upon a mere finding or a report by the Interstate Commerce Commission, as to the reasonableness of rates for the future, without a reparation order.⁵³

§ 196. Orders of Definitive Character May Be Reviewed by Party Affected.

A party has legal standing to bring suit for judicial review of an administrative order where it affects his legal rights and thus as to

& Son v. United States (1930) 281 U. S. 249, 74 L. Ed. 832, 50 S. Ct. 315; Pittsburgh & W. Va. R. Co. v. United States (1930) 281 U. S. 479, 74 L. Ed. 980, 50 S. Ct. 378.

⁴⁹ United States v. Los Angeles & S. L. R. Co. (1927) 273 U. S. 299, 71 L. Ed. 651, 47 S. Ct. 413.

⁵⁰ United States v. Los Angeles & S. L. R. Co. (1927) 273 U. S. 299, 71 L. Ed. 651, 47 S. Ct. 413.

⁵¹ Alexander Sprunt & Son v. United States (1930) 281 U. S. 249, 74 L. Ed. 832, 50 S. Ct. 315.

⁵² Alexander Sprunt & Son v. United States (1930) 281 U. S. 249, 74 L. Ed. 832, 50 S. Ct. 315.

⁵³ Jeanneret v. Chicago, B. & Q. R. Co. (C. C. A. 7th, 1927) 17 F. (2d) 978, cert. den. 275 U. S. 531, 72 L. Ed. 410, 48 S. Ct. 29.

him has a definitive character.⁵⁴ The question whether an order complained of is of such character as to be reviewable is basic to the jurisdiction of the court, and cannot be waived by consent of the parties,⁵⁵ nor may it be circumvented on the theory that review by the issuance of a writ provided for in section 262 of the Judicial Code⁵⁶ is necessary to protect the "prospective appellate jurisdiction" of a Circuit Court of Appeals. In fact a court which can review appropriate administrative action has no appellate jurisdiction, prospective or otherwise, where no administrative action of a definitive character has been taken, as where only a preliminary order is in existence.⁵⁷

Similarly, in a suit to enforce an order the complaint must aver that the order affected legal rights.⁵⁸

54 Federal Communications Commission.

Southland Industries, Inc. v. Federal Communications Commission (1938) 69 App. D. C. 82, 99 F. (2d) 117.

Federal Power Commission.

* Federal Power Commission v. Metropolitan Edison Co. (1938) 304 U. S. 375, 82 L. Ed. 1408, 58 S. Ct. 963.

Interstate Commerce Commission.

Alton R. Co. v. United States (1932) 287 U. S. 229, 77 L. Ed. 275, 53 S. Ct. 124; United States v. Los Angeles & S. L. R. Co. (1927) 273 U. S. 299, 71 L. Ed. 651, 47 S. Ct. 413. See United States v. Lowden (1939) 308 U. S. 225, 84 L. Ed. 208, 60 S. Ct. 248; United States v. Chicago, M., St. P. & P. R. Co. (1931) 282 U. S. 311, 75 L. Ed. 359, 51 S. Ct. 159; Algoma Coal & Coke Co. v. United States (D. C. E. D. Va. 1935) 11 F. Supp. 487.

Railroad Labor Board.

Pennsylvania Railroad System, etc., Federation v. Pennsylvania R. Co. (1925) 267 U. S. 203, 69 L. Ed. 574, 45 S. Ct. 307; Pennsylvania R. Co. v. United States Railroad Labor Board (1923) 261 U. S. 72, 67 L. Ed. 536, 43 S. Ct. 278.

State Agencies.

New York Cent. R. Co. v. New

York & Pennsylvania Co. (1926) 271 U. S. 124, 70 L. Ed. 865, 46 S. Ct. 447.

55 Federal Communications Commission.

Woodmen of the World Life Ins. Ass'n v. Federal Communications Commission (1938) 69 App. D. C. 87, 99 F. (2d) 122.

Interstate Commerce Commission.

See United States v. Griffin (1938) 303 U. S. 226, 82 L. Ed. 764, 58 S. Ct. 601.

National Bituminous Coal Commission.

Mallory Coal Co. v. National Bituminous Coal Commission (1938) 69 App. D. C. 166, 99 F. (2d) 399.

Securities and Exchange Commission.

Houston Natural Gas Corp. v. Securities & Exchange Commission (C. C. A. 4th, 1938) 100 F. (2d) 5.

56 28 USCA 377.

57 Federal Power Commission v. Metropolitan Edison Co. (1993) 304 U. S. 375, 82 L. Ed. 1408, 58 S. Ct. 963.

58 Pennsylvania Railroad System, etc., Federation v. Pennsylvania R. Co. (1925) 267 U. S. 203, 69 L. Ed. 574, 45 S. Ct. 307; Pennsylvania R. Co. v. United States Railroad Labor Board (1923) 261 U. S. 72, 67 L. Ed. 536, 43 S. Ct. 278.

§ 197. Orders Which Have a Definitive Character.

Orders of definitive character which are reviewable include all orders granting a license to a competing radio station which may work economic injury to the complainant, through audience depletion or electrical interference;⁵⁹ an order permitting proposed acquisition of control over one railroad by another;⁶⁰ requiring a railroad to carry certain property on its books in a particular classification;⁶¹ denying a petition to annul a divisional report declaring petitioner's method of accounting unlawful;⁶² prescribing temporary rates, which is a final legislative act as to a particular period;⁶³ requiring, by a certain date, the establishment of joint through routes, and providing penalties for non-compliance by the date set;⁶⁴ refusing approval of an application to merge companies under section 203(a) of the Federal Power Act as "not consistent with the public interest";⁶⁵ an order of the Securities and Exchange Commission refusing to exempt a corporation from regulatory provisions of the Act, which casts doubt upon the legality of the stock of a stockholder of the corporation;⁶⁶ and orders which are permissive in character only but authorize an act otherwise prohibited.⁶⁷ A ferry company within a state, operating under a state charter, is a party in interest capable of suing to set aside an order of the Interstate Commerce Commission where its bill discloses that the proposed and permitted action might directly and

⁵⁹ Federal Communications Commission.

Federal Communications Commission v. Sanders Bros. Radio Station (1940) 309 U. S. 470, 84 L. Ed. 869, 60 S. Ct. 693, rehearing denied 309 U. S. 642, 698, 84 L. Ed. 1037, 60 S. Ct. 693; Tri-State Broadcasting Co. v. Federal Communications Commission (1939) 71 App. D. C. 157, 107 F. (2d) 956. See Yankee Network, Inc. v. Federal Communications Commission (1939) 71 App. D. C. 11, 107 F. (2d) 212; Pittsburgh Radio Supply House v. Federal Communications Commission (1938) 69 App. D. C. 22, 98 F. (2d) 303.

⁶⁰ The Chicago Junction Case (1924) 264 U. S. 258, 68 L. Ed. 667, 44 S. Ct. 317.

⁶¹ Norfolk & W. R. Co. v. United States (D. C. Va. 1931) 52 F. (2d) 967, aff'd 287 U. S. 134, 77 L. Ed.

218, 53 S. Ct. 52.

⁶² Chesapeake & O. R. Co. v. United States (D. C. E. D. Va. 1933) 5 F. Supp. 7.

⁶³ Prendergast v. New York Telephone Co. (1923) 262 U. S. 43, 67 L. Ed. 853, 43 S. Ct. 466; Clark's Ferry Bridge Co. v. Public Service Commission (1934) 291 U. S. 227, 78 L. Ed. 767, 54 S. Ct. 427.

⁶⁴ Missouri Pac. R. Co. v. United States (D. C. E. D. Mo., E. Div., 1936) 16 F. Supp. 752.

⁶⁵ Federal Power Commission v. Pacific Power & Light Co. (1939) 307 U. S. 156, 83 L. Ed. 1180, 59 S. Ct. 766.

⁶⁶ Lawless v. Securities & Exchange Commission (C. C. A. 1st, 1939) 105 F. (2d) 574.

⁶⁷ The Chicago Junction Case (1924) 264 U. S. 258, 68 L. Ed. 667, 44 S. Ct. 317.

adversely affect its welfare by changing the transportation situation.⁶⁸

Under the Urgent Deficiencies Act,^{68a} every order reviewed by the courts has been an exercise either of the quasi-judicial function of determining controversies, or of the delegated legislative function of rate-making and rule-making.⁶⁹ An Interstate Commerce Commission order defining zones exempt from the effect of the Motor Carrier Act and purporting to remove a qualified exemption from certain municipalities but subjecting such carriers as did not comply with regulations made on the basis of such definition of zones to penalties, was reviewable as an order of definitive character.⁷⁰

§ 198. — Order Not Reviewable Under Particular Statute in Jurisdiction of Particular Court.

Some statutes provide for review of "final" or other types of orders within the jurisdiction of a particular court.⁷¹ The fact that an administrative order is not of the type specified in the particular statute may preclude its review in the jurisdiction of the court specified, but does not preclude appropriate judicial review in the jurisdiction of an appropriate court if it has definitive character as to the complainant.⁷² For instance, an order certifying a particular union as the exclusive bargaining agent of certain employees, while not a "final" order reviewable in a Circuit Court of Appeals under the National Labor Relations Act, is reviewable in a federal district court if it has a definitive character as to the complainant.⁷³

⁶⁸ *Claiborne-Annapolis Ferry Co. v. United States* (1932) 285 U. S. 382, 76 L. Ed. 808, 52 S. Ct. 440.

^{68a} See § 633 et seq.

⁶⁹ *United States v. Los Angeles & S. L. R. Co.* (1927) 273 U. S. 299, 71 L. Ed. 651, 47 St. Ct. 413.

⁷⁰ *Charles Noeding Trucking Co. v. United States* (D. C. N. J. 1939) 29 F. Supp. 537.

⁷¹ See the statutes set out in Appendix A, §§ 831-860.

⁷² See § 650.

Interstate Commerce Commission.

Shannahan v. United States (1938) 303 U. S. 596, 82 L. Ed. 1039, 58 S. Ct. 732; *United States v. Griffin* (1938) 303 U. S. 226, 82 L. Ed. 764, 58 S. Ct. 601.

National Bituminous Coal Commission.

Utah Fuel Co. v. National Bituminous Coal Commission (1939) 306 U. S. 56, 83 L. Ed. 483, 59 S. Ct. 409.

National Labor Relations Board.

American Federation of Labor v. National Labor Relations Board (1940) 308 U. S. 401, 84 L. Ed. 347, 60 S. Ct. 300; *American Federation of Labor v. Madden* (D. C. D. C. 1940) 33 F. Supp. 943.

National Mediation Board.

Shields v. Utah Idaho C. R. Co. (1938) 305 U. S. 177, 83 L. Ed. 111, 59 S. Ct. 160.

⁷³ *American Federation of Labor v. National Labor Relations Board* (1940) 308 U. S. 40, 84 L. Ed. 347,

§ 199. Orders Which Do Not Have a Definitive Character.

§ 200. — Orders of Preliminary or Procedural Character.

Administrative orders which are not of definitive character so as to be judicially reviewable include an order which marks only a preliminary stage in, rather than the disposition of, a controversy;⁷⁴ which merely seeks information prior to the beginning of the administrative fact-finding process;⁷⁵ which merely directs that information furnished to the agency be made available for inspection by interested parties on final hearing;⁷⁶ or which in substance is only a notice initiating or continuing a hearing;⁷⁷ "orders" which are mere reports, recommendations, statements of expectation, or admonitory rather than mandatory;⁷⁸ and valuation "orders" made by the Interstate Commerce Commission⁷⁹ under the Valuation Act.⁸⁰ These do not exercise the Commission's quasi-legislative or quasi-judicial power.⁸¹

60 S. Ct. 300; *American Federation of Labor v. Madden* (D. C., D. C. 1940) 33 F. Supp. 943.

⁷⁴ See *Alton R. Co. v. United States* (1932) 287 U. S. 229, 77 L. Ed. 275, 53 S. Ct. 124.

⁷⁵ **Federal Power Commission.**

Federal Power Commission v. Metropolitan Edison Co. (1938) 304 U. S. 375, 82 L. Ed. 1408, 58 S. Ct. 963.

National Bituminous Coal Commission.

Mallory Coal Co. v. National Bituminous Coal Commission (1938) 69 App. D. C. 166, 99 F. (2d) 399.

Securities and Exchange Commission.

Securities & Exchange Commission v. Andrews (C. C. A. 2d, 1937) 88 F. (2d) 441.

State Agencies.

State Corporation Commission of Kansas v. Wichita Gas Co. (1934) 290 U. S. 561, 78 L. Ed. 500, 54 S. Ct. 321.

⁷⁶ *Mallory Coal Co. v. National Bituminous Coal Commission* (1938) 69 App. D. C. 166, 99 F. (2d) 399.

⁷⁷ *Federal Power Commission v. Metropolitan Edison Co.* (1938) 304

U. S. 375, 82 L. Ed. 1408, 58 S. Ct. 963; *United States v. Illinois Cent. R. Co.* (1917) 244 U. S. 82, 61 L. Ed. 1007, 37 S. Ct. 584. See *Resources Corp. International v. Securities & Exchange Commission* (C. C. A. 7th, 1938) 97 F. (2d) 788.

⁷⁸ *United States v. Atlanta, B. & C. R. Co.* (1931) 282 U. S. 522, 75 L. Ed. 513, 51 S. Ct. 237. See *Standard Computing Scale Co. v. Farrell* (1919) 249 U. S. 571, 63 L. Ed. 780, 39 S. Ct. 380; *Brooklyn Eastern District Terminal v. United States* (D. C. S. D. N. Y. 1927) 28 F. (2d) 634; *Jeanneret v. Chicago, B. & Q. R. Co.* (C. C. A. 7th, 1927) 17 F. (2d) 978, cert. den. 275 U. S. 531, 72 L. Ed. 410, 48 S. Ct. 29.

⁷⁹ *United States v. Los Angeles & S. L. R. Co.* (1927) 273 U. S. 299, 71 L. Ed. 651, 47 S. Ct. 413; *Delaware & Hudson Co. v. United States* (1925) 266 U. S. 438, 69 L. Ed. 369, 45 S. Ct. 153.

⁸⁰ 49 USCA 19a.

⁸¹ *United States v. Los Angeles & S. L. R. Co.* (1927) 273 U. S. 299, 71 L. Ed. 651, 47 S. Ct. 413. See also §§ 70, 71.

A valuation "order" does not command the carrier to do, or to refrain from doing anything; it does not grant or withhold any authority, privilege or license; it does not extend or abridge any power or facility; it does not subject the carrier to any liability, civil or criminal; it does not change the carrier's existing or future status or condition; it does not determine any right or obligation.⁸² Such a so-called "order" is merely the formal record of the conclusions reached after a study of data collected in the course of extensive research conducted by the Commission, through its employees. It is an exercise solely of the function of investigation.⁸³ Moreover, the investigation made is not a step in a pending proceeding in which an order of the character of those held to be judicially reviewable could be entered later. It is merely preparation for possible action in some proceeding which may be instituted in the future—preparation deemed by Congress necessary to enable the Commission adequately to perform its duties, if and when occasion for action shall arise.⁸⁴ It may become a basis for future action by the Commission, as it may become a basis for action by Congress, or by the legislature or an administrative board of a state. But so may any report of an investigation, whether made by a committee of Congress or by the Commission pursuant to a resolution of Congress or of either branch thereof.⁸⁵ Errors may be made in the final valuation of the property of each of nearly 1800 carriers. And it is at least possible that no proceeding will ever be instituted, either before the Commission or a court, in which the valuation will be involved, or in which alleged errors will be of legal significance.⁸⁶ Thus a "final valuation" made by the Commission, although called an order, is not reviewable, since it is mere preparation for possible action, and determines no rights.⁸⁷ Analogous to this rule, is the principle that an Interstate Commerce Commission report, finding rates unreasonable for the future, will not support a suit to recover unjust charges incurred by paying such rates after the date of the report. There must be a reparation order.⁸⁸

⁸² *United States v. Los Angeles & S. L. R. Co.* (1927) 273 U. S. 299, 71 L. Ed. 651, 47 S. Ct. 413.

⁸³ *United States v. Los Angeles & S. L. R. Co.* (1927) 273 U. S. 299, 71 L. Ed. 651, 47 S. Ct. 413.

⁸⁴ *United States v. Los Angeles & S. L. R. Co.* (1927) 273 U. S. 299, 71 L. Ed. 651, 47 S. Ct. 413.

⁸⁵ *United States v. Los Angeles & S. L. R. Co.* (1927) 273 U. S. 299, 71 L. Ed. 651, 47 S. Ct. 413.

⁸⁶ *United States v. Los Angeles & S. L. R. Co.* (1927) 273 U. S. 299, 71 L. Ed. 651, 47 S. Ct. 413.

⁸⁷ *United States v. Los Angeles & S. L. R. Co.* (1927) 273 U. S. 299, 71 L. Ed. 651, 47 S. Ct. 413. See also § 196.

⁸⁸ *Jeanneret v. Chicago, B. & Q. R. Co.* (C. C. A. 7th, 1927) 17 F. (2d) 978, cert. den. 275 U. S. 531, 72 L. Ed. 410, 48 S. Ct. 29.

§ 201. — Preliminary Orders May Become Definitive.

A preliminary order which is not alone of definitive character may become so when made the basis of a further order which is of definitive character.⁸⁹ Thus an order directing an election which alone is not definitive may become so where the employer is subsequently required to do something predicated upon the result of the election.⁹⁰

§ 202. — Unenforceable Orders.

Administrative orders whose only sanction is moral and which are not legally enforceable are not of definitive character to be judicially reviewable,⁹¹ at least in the absence of an affirmative showing that one's legal rights are affected by the order.

Under the Transportation Act of 1920⁹² a decision of the Railroad Labor Board was not enforceable by process. The only sanction of the Board's decision was the force of public opinion invoked by the fairness of a full hearing, the intrinsic justice of the conclusion, strengthened by the official prestige of the Board, and the full publication of the violation of such decision by any party to the proceeding. Since there was nothing compulsory in the statute as against company or employees, on the basis of which either acquired rights against the other which could be enforced in a court of law,⁹³ compliance with the Board's decision could not be enforced by mandatory injunction.⁹⁴ Judicial review would not be based upon the legal rights of the parties, but on the Board's judgment as to what legal rights the disputants should surrender or abate in their own and the public interest to avoid severing harmonious relations, which rights they have a strict legal right to retain.⁹⁵

⁸⁹ National Labor Relations Board v. Falk Corp. (1940) 308 U. S. 453, 84 L. Ed. 396, 60 S. Ct. 307; American Federation of Labor v. National Labor Relations Board (1940) 308 U. S. 401, 84 L. Ed. 347, 60 S. Ct. 300. See United States v. Los Angeles & S. L. R. Co. (1927) 273 U. S. 299, 71 L. Ed. 651, 47 S. Ct. 413.

⁹⁰ National Labor Relations Board v. Falk Corp. (1940) 308 U. S. 453, 84 L. Ed. 261, 60 S. Ct. 307.

⁹¹ Pennsylvania Railroad System, etc., Federation v. Pennsylvania R. Co. (1925) 267 U. S. 203, 69 L. Ed. 574, 45 S. Ct. 307; Pennsylvania R. Co. v. United States Railroad Labor

Board (1923) 261 U. S. 72, 67 L. Ed. 536, 43 S. Ct. 278.

⁹² 45 USCA 131 et seq.

⁹³ Pennsylvania R. Co. v. United States Railroad Labor Board (1923) 261 U. S. 72, 67 L. Ed. 536, 43 S. Ct. 278.

⁹⁴ Pennsylvania Railroad System, etc., Federation v. Pennsylvania R. Co. (1925) 267 U. S. 203, 69 L. Ed. 574, 45 S. Ct. 307.

⁹⁵ Pennsylvania Railroad System, etc., Federation v. Pennsylvania R. Co. (1925) 267 U. S. 203, 69 L. Ed. 574, 45 S. Ct. 307; Pennsylvania R. Co. v. United States Railroad Labor Board (1923) 261 U. S. 72, 67 L. Ed. 536, 43 S. Ct. 278.

§ 203. — Orders Rescinded, Modified, Withdrawn; Rehearing.

Where an order of an administrative agency is modified by a subsequent order, the first order is no longer of definitive character⁹⁶ except to the extent that it is not modified and remains effective. An order is not modified and does not lose its definitive character by the mere granting of a petition for a rehearing,⁹⁷ unless by statute the administrative order does not become final while an application for rehearing is pending.⁹⁸ Likewise an order is not of definitive character which has been withdrawn or rescinded.⁹⁹ An order is rescinded where the complaint upon which it was based is subsequently dismissed. Mere reopening of the proceedings for further hearing does not restore the order.¹

§ 204. — Orders Conferring Bounty or Gratuity.

An order directing that a particular party is to receive a bounty or gratuity voted by Congress, to which he has no legal right, is not of definitive character and is not subject to judicial review.²

§ 205. "Negative" Order Rule Abolished.

The "negative" order rule, originated in the Procter and Gamble case which asserted that "negative" orders were not reviewable,³ is now abolished in its entirety, and has no application whatever to any agency.⁴ The Procter and Gamble case itself is now regarded as rest-

⁹⁶ *Baltimore & O. R. Co. v. United States* (1938) 304 U. S. 58, 82 L. Ed. 1148, 58 S. Ct. 767.

⁹⁷ *Gulf, M. & N. R. Co. v. Merchants' Specialty Co.* (C. C. A. 5th, 1931) 50 F. (2d) 21.

⁹⁸ *United States ex rel. Dascomb v. Board of Tax Appeals* (1926) 56 App. D. C. 392, 16 F. (2d) 337; *Black River Valley Broadcasts, Inc. v. McNinch* (1938) 69 App. D. C. 311, 101 F. (2d) 235, cert. den. (1939) 307 U. S. 623, 83 L. Ed. 1501, 59 S. Ct. 793.

⁹⁹ *Minneapolis & St. L. R. Co. v. Peoria & P. U. R. Co.* (1926) 270 U. S. 580, 70 L. Ed. 743, 46 S. Ct. 402.

¹ *Minneapolis & St. L. R. Co. v. Peoria & P. U. R. Co.* (1926) 270 U. S. 580, 70 L. Ed. 743, 46 S. Ct. 402.

² *Butte, Anaconda & Pacific R. Co. v. United States* (1933) 290 U. S. 127, 78 L. Ed. 222, 54 S. Ct. 108.

³ *Procter & Gamble Co. v. United States* (1912) 225 U. S. 282, 56 L. Ed. 1091, 32 S. Ct. 761.

⁴ *Federal Power Commission v. Pacific Power & Light Co.* (1939) 307 U. S. 156, 83 L. Ed. 1180, 57 S. Ct. 766; *United States v. Maher* (1939) 307 U. S. 148, 83 L. Ed. 1162, 59 S. Ct. 768, rehearing denied 307 U. S. 649, 83 L. Ed. 1528, 59 S. Ct. 831; **Rochester Telephone Corp. v. United States* (1939) 307 U. S. 125, 83 L. Ed. 1147, 59 S. Ct. 754. See *American Federation of Labor v. National Labor Relations Board* (1940) 308 U. S. 401, 84 L. Ed. 347, 60 S. Ct. 300.

ing validly on other grounds, that is, the traditional criteria for bringing judicial action into play.⁵

Orders formerly regarded as "negative" were where the action sought to be reviewed:

- (1) would take effect only if the agency did some further act, or
- (2) declined to relieve the complainant from the operation of a statute, or
- (3) did not affect the complainant, but declined to affect a third person.⁶

As has been said above, the Procter and Gamble case is now seen to rest on established general rules, and not doctrines of limited application confined to this field. Applying this reasoning to orders formerly regarded as "negative," it develops that orders in the second and third groups are now reviewable in an appropriate case.⁷ Those orders in group (1) which are still not reviewable are without the scope of review, not because of the existence of a "negative" order rule, but because of traditional rules for bringing judicial action into play. Resort to the courts in such situations is either premature or wholly beyond the province of the courts.⁸

III. RIGHT TO REVIEW FINDINGS

§ 206. Findings Reviewable Only Where of Definitive Character.

The ordinary practice of administrative agencies with respect to findings or determinations is to incorporate them by reference in an accompanying order which is based on the findings. Hence where an order is made, judicial review of the findings is necessarily accomplished if the order is reviewed. However, under some administrative schemes, findings or determinations may be made which are not followed by order or sanction of any kind. Usually an administrative finding, upon which no order is based, determines no rights and is not of definitive character. In those circumstances it is not judicially reviewable since no legal rights are affected. An administrative find-

⁵ Rochester Telephone Corp. v. United States (1939) 307 U. S. 125, 83 L. Ed. 1147, 59 S. Ct. 754.

⁶ Rochester Telephone Corp. v. United States (1939) 307 U. S. 125, 83 L. Ed. 1147, 59 S. Ct. 754.

⁷ Rochester Telephone Corp. v. United States (1939) 307 U. S. 125,

⁸ Rochester Telephone Corp. v. United States (1939) 307 U. S. 125, 83 L. Ed. 1147, 59 S. Ct. 754; California v. Lattimer (1938) 305 U. S. 255, 83 L. Ed. 159, 59 S. Ct. 166. See also § 199.

ing which is advisory only affects no legal rights, is not of definitive character, and is ordinarily not reviewable.⁹

In 1931 it was stated that no case had been found in which matter embodied in a report and not followed by a formal order had been held subject to judicial review.¹⁰ Since then, however, findings or determinations which affect legal rights and are thus of definitive character have been held to be judicially reviewable in an appropriate court,¹¹ although they may not be reviewable under the Urgent Deficiencies Act¹² or other statutes conferring special jurisdiction upon particular courts. They are reviewable, for instance, where they subject a party to criminal penalties¹³ or where they may be the basis of an order by a separate agency¹⁴ or by a court.¹⁵

Thus where an agency makes an appropriate finding of reasonable compensation under the Railway Mail Pay Service Act, but fails, because of an alleged error of law, to order payment of the full amount which is payable under the finding, the Court of Claims has jurisdiction of an action for the balance, as the claim is founded on a law of Congress.¹⁶ And a finding or determination which was held to be not reviewable under the Urgent Deficiencies Act may be reviewed in a one judge district court.¹⁷ However, a mere finding or report as to the unreasonableness of rates will not support a shipper's suit to recover overcharges, without any reparation order.¹⁸

⁹ *Norwegian Nitrogen Products Co. v. United States* (1933) 288 U. S. 294, 77 L. Ed. 796, 53 S. Ct. 350.

¹⁰ *United States v. Atlanta, B. & C. R. Co.* (1931) 282 U. S. 522, 75 L. Ed. 513, 51 S. Ct. 237.

¹¹ *Interstate Commerce Commission.*

Shannahan v. United States (1938) 303 U. S. 596, 82 L. Ed. 1039, 58 S. Ct. 732; *United States v. Griffin* (1938) 303 U. S. 226, 82 L. Ed. 764, 58 S. Ct. 601. See *Shields v. Utah Idaho C. R. Co.* (1938) 305 U. S. 177, 83 L. Ed. 111, 59 S. Ct. 160.

Secretary of Agriculture.

See *United States v. Morgan* (1939) 307 U. S. 183, 83 L. Ed. 1211, 59 S. Ct. 795.

¹² *Shannahan v. United States* (1938) 303 U. S. 596, 82 L. Ed. 1039, 58 S. Ct. 732; *United States v. Atlanta, B. & C. R. Co.* (1931) 282 U. S. 522, 75 L. Ed. 513, 51 S. Ct. 237.

See *Great Northern R. Co. v. United States* (1928) 277 U. S. 172, 72 L. Ed. 838, 48 S. Ct. 466.

¹³ *Shannahan v. United States* (1938) 303 U. S. 596, 82 L. Ed. 1039, 58 S. Ct. 732.

¹⁴ *Shields v. Utah Idaho C. R. Co.* (1938) 305 U. S. 177, 83 L. Ed. 111, 59 S. Ct. 160.

¹⁵ *Virginian R. Co. v. System Federation, R. E. D.* (1937) 300 U. S. 515, 81 L. Ed. 789, 57 S. Ct. 592.

¹⁶ *United States v. Griffin* (1938) 303 U. S. 226, 82 L. Ed. 764, 58 S. Ct. 601.

¹⁷ *Shields v. Utah Idaho C. R. Co.* (1938) 305 U. S. 177, 83 L. Ed. 111, 59 S. Ct. 160.

¹⁸ *Jeanneret v. Chicago, B. & Q. R. Co.* (C. C. A. 7th, 1927) 17 F. (2d) 978, cert. den. 275 U. S. 531, 72 L. Ed. 410, 48 S. Ct. 29.

IV. RULES AND REGULATIONS

§ 207. In General.

Administrative rules and regulations may be judicially reviewed where an order is based upon them or any attempt to enforce them is threatened which affect a party's legal rights.¹⁹ An analogy is afforded in the instance of Rules of the Senate. Where the consideration to be given a Senate rule affects persons other than members of the Senate, the question presented is of necessity a judicial one.²⁰ An innocent person's property rights may be seriously damaged by "specifications" in the administrative bulletin of a state officer, which are acted on by local officials, but unless it is a rule or regulation which they are forced to follow, the federal court can give no relief. When such specifications are educational and, at most, advisory, they are not subject to injunction. The opinions and advice, even of those in authority, are not a law or regulation such as comes within the scope of the several provisions of the Federal Constitution designed to secure the rights of citizens as against action by the states.²¹

V. MOOT CONTROVERSIES

§ 208. No Right to Judicial Review Where Controversy Is Moot.

Just as there is no right to judicial review of administrative action which does not affect one's legal rights, there is no right to judicial review of action which did affect one's legal rights, after the controversy has become moot, whether it becomes moot before initial judicial review is completed,²² or pending appeal.²³

¹⁹ See *Panama Refining Co. v. Ryan* (1935) 293 U. S. 388, 79 L. Ed. 446, 55 S. Ct. 241. See also § 489 et seq.

²⁰ *United States v. Smith* (1932) 286 U. S. 6, 76 L. Ed. 954, 52 S. Ct. 475.

²¹ *Standard Computing Scale Co. v. Farrell* (1919) 249 U. S. 571, 63 L. Ed. 780, 39 S. Ct. 380.

²² *Federal Trade Commission*.

See *Federal Trade Commission v. Goodyear Tire & Rubber Co.* (1938) 304 U. S. 257, 82 L. Ed. 1326, 58 S. Ct. 863.

Interstate Commerce Commission.

United States v. Los Angeles & S. L. R. Co. (1927) 273 U. S. 299, 71 L. Ed. 651, 47 S. Ct. 413; *Louisiana Development Co. v. United States (D.*

C. E. D. La. 1937) 18 F. Supp. 629.

National Bituminous Coal Commission.

City of Atlanta, Ga. v. National Bituminous Coal Commission (1938) 69 App. D. C. 115, 99 F. (2d) 348.

National Labor Relations Board.

Acme Machine Products Co., Inc. v. National Labor Relations Board (C. C. A. 7th, 1935) 79 F. (2d) 519. See *National Labor Relations Board v. Pennsylvania Greyhound Lines, Inc.* (1938) 303 U. S. 261, 82 L. Ed. 831, 58 S. Ct. 571, 115 A. L. R. 307.

The President.

Panama Refining Co. v. Ryan (1935) 293 U. S. 388, 79 L. Ed. 446, 55 S. Ct. 241.

²³ *Alexander Sprunt & Son v. United States* (1930) 281 U. S. 249,

§ 209. When Controversy Is Moot.

Where, due to a mistake, a suit to enjoin administrative action under a regulation is begun and ended in the lower court after the regulation has been withdrawn, there is no cause of action with respect to that regulation. A subsequent reinstatement of the regulation accompanied by an announced intention to enforce it cannot import the regulation into the case, and the appellate court will not consider the question.²⁴ Controversies with administrative agencies become moot where the order in question is revoked pending judicial review;²⁵ and where the order in question was made under the authority of a statute which expires.²⁶ A final valuation made by the Interstate Commerce Commission and not acted upon is not reviewable in court because *inter alia*, the question presented is moot.²⁷ Where carriers attacking an order abandon the attack on appeal, the issues become moot and a shipper who intervened in the suit, but who has no independent right to sue, cannot continue the suit.²⁸ A case which concerns solely the propriety of conduct of a hearing before the Tariff Commission becomes moot when the Commission concludes its investigation and reports to the President, who proclaims a new tariff, since neither the Commission nor the President is under a duty to reinvestigate, and the court has no power to order further investigation.²⁹

An appeal from a decree staying enforcement of an administrative order pending appeal becomes moot when the stay is dissolved.³⁰

§ 210. When Controversy Is Not Moot.

Where effective regulations attacked are amended, but the amended regulations continue substantially the earlier requirements and expand them, they present the same constitutional questions, and the case as

74 L. Ed. 832, 50 S. Ct. 315; *United States ex rel. Norwegian Nitrogen Products Co. v. United States Tariff Commission* (1927) 274 U. S. 106, 71 L. Ed. 949, 47 S. Ct. 499. See *United States v. Rock Royal Co-operative, Inc.* (1939) 307 U. S. 533, 83 L. Ed. 1446, 59 S. Ct. 993.

²⁴ *Panama Refining Co. v. Ryan* (1935) 293 U. S. 388, 79 L. Ed. 446, 55 S. Ct. 241.

²⁵ *City of Atlanta, Ga. v. National Bituminous Coal Commission* (1938) 69 App. D. C. 115, 99 F. (2d) 348.

²⁶ *Aeme Machine Products Co., Inc.*

v. National Labor Relations Board (C. C. A. 7th, 1935) 79 F. (2d) 519.

²⁷ *United States v. Los Angeles & S. L. R. Co.* (1927) 273 U. S. 299, 71 L. Ed. 651, 47 S. Ct. 413.

²⁸ *Alexander Sprunt & Son v. United States* (1930) 281 U. S. 249, 74 L. Ed. 832, 50 S. Ct. 315.

²⁹ *United States ex rel. Norwegian Nitrogen Products Co. v. United States Tariff Commission* (1927) 274 U. S. 106, 71 L. Ed. 949, 47 S. Ct. 499.

³⁰ *Ohio v. United States* (1934) 292 U. S. 498, 78 L. Ed. 1388, 54 S. Ct. 792.

to such regulations is not moot.³¹ Nor is it moot when the agency, under statutory authorization,³² suspends an order because of a district court decree holding the statute unconstitutional and the effect of that decree on the administration and enforcement of the order, since the suspension was authorized by statute and the order preserved accrued rights.³³ Compliance with an order of continuing character, affecting a party's legal rights during its existence, does not render moot a controversy over the order.³⁴ Where the time during which, by its terms, an order is to be effective has expired, a controversy over the order does not become moot where interests of a public character are involved and have been asserted by the government, under conditions that are continuing or may be immediately repeated.³⁵ Expiration of the time for administrative action does not make the controversy moot where there is a purpose on the part of the attacking party to continue in business so that the controversy will arise again.³⁶ For instance an action in mandamus to compel a state officer to license plaintiff's business for the next ensuing year without complying with certain statutory provisions does not become moot upon the expiration of that year, where petitioner alleges that the statutory provisions are unconstitutional and the parties stipulate that petitioner purposes to continue in the business.³⁷ A controversy over the validity of a state administrative order does not become moot upon a decision by the highest court of the state, in a different suit involving the same questions, indicating that the order would be held invalid in that court, where the record in the federal court is silent as to any intention on the part of the agency to abandon attempts to enforce the order.³⁸ An administrative order does not become moot because the act prohibited by the order becomes expressly prohibited by statute, as the order can still be enforced for violation of the original statute.³⁹

³¹ *Panama Refining Co. v. Ryan* (1911) 219 U. S. 498, 55 L. Ed. 310, 31 S. Ct. 279.
³² *E. g., the Argicultural Marketing Agreement Act*, 7 USCA 601 et seq.
³³ *United States v. Rock Royal Co-operative, Inc.* (1939) 307 U. S. 533, 83 L. Ed. 1446, 59 S. Ct. 993.

³⁴ *Louisville Cement Co. v. United States* (D. C. W. D. Ky. 1937) 19 F. Supp. 910.

³⁵ *Southern Pacific Terminal Co. v. Interstate Commerce Commission*

(1911) 219 U. S. 498, 55 L. Ed. 310, 31 S. Ct. 279.
³⁶ *Leonard v. Earle* (1929) 279 U. S. 392, 73 L. Ed. 754, 49 S. Ct. 372.

³⁷ *Leonard v. Earle* (1929) 279 U. S. 392, 73 L. Ed. 754, 49 S. Ct. 372.

³⁸ *Union Light, Heat & Power Co. v. Railroad Commission of Kentucky* (D. C. E. D. Ky. 1926) 17 F. (2d) 143.

³⁹ *Federal Trade Commission v. Goodyear Tire & Rubber Co.* (1938)

An administrative proceeding does not become moot where hearings before an examiner have been closed and no examiner's report has been made despite the elapse of a substantial period of time.⁴⁰

§ 211. — Compliance with Administrative Sanction Immaterial.

Orders which have a continuing character, such as cease and desist orders, do not ordinarily become moot.⁴¹ An administrative order, lawful when made, does not become moot because it has been obeyed⁴² or partially obeyed,⁴³ or because recommendations of a trial examiner are performed by the party to whom they are directed.⁴⁴ Hence evidence to show compliance with an administrative order is not material and will not be received on judicial review.⁴⁵ For instance, in a suit to set aside a back-pay order of the National Labor Relations Board, releases to the company from those in whose favor the back pay orders run, are not material evidence, and will not be received.⁴⁶ Where a utility has made a part of the extensions ordered by a Commission, but is unwilling fully to comply with the order and maintains that it is invalid, and the Commission may bring summary pro-

304 U. S. 257, 82 L. Ed. 1326, 58 S. Ct. 863.

⁴⁰ *Newport News Shipbuilding & Dry Dock Co. v. Schaffner* (1938) 303 U. S. 54, 82 L. Ed. 646, 58 S. Ct. 466.

⁴¹ *Federal Trade Commission v. Goodyear Tire & Rubber Co.* (1938) 304 U. S. 257, 82 L. Ed. 1326, 58 S. Ct. 863. See *National Labor Relations Board v. Gerling Furniture Mfg. Co.* (C. C. A. 7th, 1939) 103 F. (2d) 663.

⁴² *Federal Trade Commission*.

Federal Trade Commission v. Goodyear Tire & Rubber Co. (1938) 304 U. S. 257, 82 L. Ed. 1326, 58 S. Ct. 863.

National Labor Relations Board.

National Labor Relations Board v. Pennsylvania Greyhound Lines, Inc. (1938) 303 U. S. 261, 82 L. Ed. 831, 58 S. Ct. 571, 115 A. L. R. 307; *National Labor Relations Board v. Gerling Furniture Mfg. Co.* (C. C. A. 7th 1939) 103 F. (2d) 663; *National Labor Relations Board v. Pure Oil Co.* (C. C. A. 5th, 1939) 103 F. (2d) 497;

National Labor Relations Board v. Oregon Worsted Co. (C. C. A. 9th 1938) 96 F. (2d) 193.

⁴³ *New York ex rel. Woodhaven Gas Light Co. v. Public Service Commission of New York* (1925) 269 U. S. 244, 70 L. Ed. 255, 46 S. Ct. 83; *Federal Trade Commission v. Good-Grape Co.* (C. C. A. 6th, 1930) 45 F. (2d) 70.

⁴⁴ *National Labor Relations Board v. Oregon Worsted Co.* (C. C. A. 9th, 1938) 94 F. (2d) 671.

⁴⁵ *National Labor Relations Board v. American Potash & Chemical Corp.* (C. C. A. 9th, 1938) 98 F. (2d) 488, cert. den. 306 U. S. 643, 83 L. Ed. 1043, 59 S. Ct. 582; *National Labor Relations Board v. Biles-Coleman Lumber Co.* (C. C. A. 9th, 1938) 96 F. (2d) 197.

⁴⁶ *National Labor Relations Board v. American Potash & Chemical Corp.* (C. C. A. 9th, 1938) 98 F. (2d) 488, cert. den. 306 U. S. 643, 83 L. Ed. 1043, 59 S. Ct. 582.

ceedings to enforce the order, which has been upheld by the highest state court, and the Supreme Court cannot say that the facts shown would constitute a defense in such summary proceedings, the case is not moot.⁴⁷

§ 212. — Effect of Changed Conditions.

Changed conditions do not ordinarily render moot a controversy occasioned by an administrative order, although they may indicate less need for the order.⁴⁸ Thus an order of the National Labor Relations Board directing withdrawal of recognition from a company union does not become moot when an outside union is certified as the employer's lawful representative for collective bargaining.⁴⁹ Evidence to show that changed circumstances have rendered an administrative order nugatory or unenforceable is immaterial.⁵⁰

⁴⁷ New York ex rel. Woodhaven Gas Light Co. v. Public Service Commission of New York (1925) 269 U. S. 244, 70 L. Ed. 255, 46 S. Ct. 83.

⁴⁸ National Labor Relations Board v. Pennsylvania Greyhound Lines, Inc. (1938) 303 U. S. 261, 82 L. Ed. 831, 58 S. Ct. 571, 115 A. L. R. 307.

⁴⁹ National Labor Relations Board v. Pennsylvania Greyhound Lines, Inc. (1938) 303 U. S. 261, 82 L. Ed. 831, 58 S. Ct. 571, 115 A. L. R. 307.

⁵⁰ National Labor Relations Board v. Biles-Coleman Lumber Co. (C. C. A. 9th, 1938) 96 F. (2d) 197.

PART II

PREREQUISITE TO JUDICIAL RELIEF—EXHAUSTION OF ADMINISTRATIVE REMEDIES

CHAPTER 15

PRIMARY JURISDICTION

§ 213. Introduction.

I. RESPECTING ADMINISTRATIVE QUESTIONS

§ 214. The Primary Jurisdiction Doctrine.

§ 215. Bases of the Doctrine.

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II. RESPECTING JUDICIAL QUESTIONS

§ 219. Primary Jurisdiction Traditionally in the Courts. Procedural Commitment to Agency.

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§ 222. Rule Applies Even Though Agency Could Make Private Instead of Public Investigation.

§ 223. Declaratory Judgment Act Does Not Mitigate Force of Rule.

§ 224. Judicial Questions Which Have Been Exclusively Committed for Initial Administrative Decision.

§ 225. Limitation of Rule.

§ 213. Introduction.

It is imperative that this chapter be considered in the light of the succeeding chapter devoted to the rule requiring exhaustion of administrative remedies before judicial relief is sought. Both principles are rooted in the general requirement that an administrative remedy must be pursued before invoking judicial relief. The primary jurisdiction doctrine requires that administrative questions be determined by agencies, rather than courts. The rule requiring exhaustion of administrative remedies requires that, once an initial administrative determination has been made, complaints respecting the determination must be presented through any remaining administrative

channels before seeking judicial relief. One is a rigorous primary jurisdictional requirement. The other, in substance, requires full exhaustion of that primary jurisdiction through whatever administrative appeals, or their equivalent, are provided.¹

I. RESPECTING ADMINISTRATIVE QUESTIONS

§ 214. The Primary Jurisdiction Doctrine.

Administrative questions, which are ordinarily questions of fact,² matters which call for the technical knowledge of an administrative agency, must first be determined by the agency before judicial relief can be sought. This primary jurisdiction is exclusive. A court does not have jurisdiction to determine administrative questions, or to adjudicate controversies involving them until they have been determined by the appropriate administrative agency. This is the primary jurisdiction doctrine.³ Where the court has no jurisdiction under

¹ See § 226 et seq.

² See § 505 et seq.

³ Federal Communications Commission.

* Rochester Telephone Corp. v. United States (1939) 307 U. S. 125, 89 L. Ed. 1147, 59 S. Ct. 754; Southland Industries, Inc. v. Federal Communications Commission (1938) 69 App. D. C. 82, 99 F. (2d) 117.

Interstate Commerce Commission.

St. Louis, B. & M. R. Co. v. Brownsville Nav. District (1938) 304 U. S. 295, 82 L. Ed. 1357 58 S. Ct. 868; Terminal Warehouse v. Pennsylvania R. Co. (1936) 297 U. S. 500, 80 L. Ed. 827, 56 S. Ct. 546; Standard Oil Co. v. United States (1931) 283 U. S. 235, 75 L. Ed. 999, 51 S. Ct. 429; Alexander Sprunt & Son v. United States (1930) 281 U. S. 249, 74 L. Ed. 832, 50 S. Ct. 315; Delaware & H. Co. v. United States (1925) 266 U. S. 438, 69 L. Ed. 369, 45 S. Ct. 153; Terminal R. Ass'n v. United States (1924) 266 U. S. 17, 69 L. Ed. 150, 45 S. Ct. 5; Dayton-Goose Creek R. Co. v. United States (1924) 263 U. S. 456, 68 L. Ed. 388, 44 S. Ct. 169; * Great Northern R. Co. v. Merchants Elevator Co. (1922) 259 U. S. 285, 66 L. Ed. 943,

42 S. Ct. 477; Director General v. Viscoze Co. (1921) 254 U. S. 498, 65 L. Ed. 372, 41 S. Ct. 151; Skinner & Eddy Corp. v. United States (1919) 249 U. S. 557, 63 L. Ed. 772, 39 S. Ct. 375; * Loomis v. Lehigh Valley R. Co. (1916) 240 U. S. 43, 60 L. Ed. 517, 36 S. Ct. 228; Pennsylvania R. Co. v. Puritan Coal Min. Co. (1915) 237 U. S. 121, 59 L. Ed. 867, 35 S. Ct. 484; * Robinson v. Baltimore & O. R. Co. (1912) 222 U. S. 506, 56 L. Ed. 288, 32 S. Ct. 114; Interstate Commerce Commission v. Chicago, R. I. & P. R. Co. (1910) 218 U. S. 88, 54 L. Ed. 939, 30 S. Ct. 651; Baltimore & O. R. Co. v. United States ex rel. Pitcairn Coal Co. (1910) 215 U. S. 481, 54 L. Ed. 292, 30 S. Ct. 164; * Texas & P. R. Co. v. Abilene Cotton Oil Co. (1907) 204 U. S. 426, 51 L. Ed. 553, 27 S. Ct. 350; United States ex rel. Arlington & F. Auto R. Co. v. Elgen (1938) 68 App. D. C. 392, 98 F. (2d) 264; Baltimore & O. R. Co. v. Domestic Hardwoods, Inc. (1933) 62 App. D. C. 142, 65 F. (2d) 488, cert. den. 290 U. S. 647, 78 L. Ed. 561, 54 S. Ct. 64; Davis v. Krauss Bros. Lumber Co. (D. C. E. D. La. 1928) 25 F. (2d) 888.

the doctrine it may not acquire it by consent of the parties.⁴

This ironclad rule was established in the Abilene Cotton Oil case⁵ and is one of the foundations of administrative law. It is interesting to note that Mr. Justice Pitney, dissenting in the Mitchell Coal case, advanced the theory that the rule of primary jurisdiction ought to apply to the Interstate Commerce Commission only when it acts quasi-legislatively, and not when its action is quasi-judicial, as in the case of a proceeding for a reparation award. The majority thought the same need for uniformity of administrative determination controlled in administrative quasi-judicial action as in quasi-legislative action.⁶

See *Louisville & N. R. Co. v. Behlmer* (1900) 175 U. S. 648, 44 L. Ed. 309, 20 S. Ct. 209. But see *Freeman v. United States* (C. C. A. 8th, 1925) 4 F. (2d) 13; *Rex Coal Co. v. Cleveland, C., C. & St. L. R. Co.* (D. C. E. D. Ill. 1935) 9 F. Supp. 179.

National Labor Relations Board.

* *Fur Workers Union, Local No. 72 v. Fur Workers Union* (1939) 70 App. D. C. 122, 105 F. (2d) 1, aff'd 308 U. S. 522, 84 L. Ed. 443, 60 S. Ct. 292. See *Myers v. Bethlehem Shipbuilding Corp.* (1938) 303 U. S. 41, 82 L. Ed. 638, 58 S. Ct. 459.

Secretary of the Interior.

Cosmos Exploration Co. v. Gray Eagle Oil Co. (1903) 190 U. S. 301, 47 L. Ed. 1064, 23 S. Ct. 692.

State Agencies.

Railroad Commissioners v. Great Northern R. Co. (1930) 281 U. S. 412, 74 L. Ed. 936, 50 S. Ct. 391; *Henderson Water Co. v. Corporation Commission* (1925) 269 U. S. 278, 70 L. Ed. 273, 46 S. Ct. 112; *Western & A. R. Co. v. Georgia Public Service Commission* (1925) 267 U. S. 493, 69 L. Ed. 753, 45 S. Ct. 409; *Goodbody v. Pennsylvania R. Co.* (C. C. A. 6th, 1928) 29 F. (2d) 67, app. dismissed 274 U. S. 181, 71 L. Ed. 989, 47 S. Ct. 550; *J. C. Famechon Co. v. Northern Pac. R. Co.* (C. C. A. 8th, 1927) 23 F. (2d) 307; *Backus-Brooks Co. v. Northern Pac. R. Co.* (C. C. A. 8th, 1927) 21

F. (2d) 4, cert. den. 275 U. S. 562, 72 L. Ed. 427, 48 S. Ct. 120; *Jeaneret v. Chicago, B. & Q. R. Co.* (C. C. A. 7th, 1927) 17 F. (2d) 978, cert. den. 275 U. S. 531, 72 L. Ed. 410, 48 S. Ct. 29; *Sanco Piece Dye Works, Inc. v. Herriek* (D. C. S. D. N. Y. 1940) 33 F. Supp. 80; *Arrow Distilleries, Inc. v. Alexander* (D. C., D. C. 1938) 24 F. Supp. 880, aff'd 306 U. S. 615, 83 L. Ed. 1023, 59 S. Ct. 489.

Respecting primary jurisdiction between federal and state agencies, see *Arkansas Railroad Commission v. Chicago, R. I. & P. R. Co.* (1927) 274 U. S. 597, 71 L. Ed. 1221, 47 S. Ct. 724; *Osborne v. San Diego Land & Town Co.* (1900) 178 U. S. 22, 44 L. Ed. 961, 20 S. Ct. 860.

United States Shipping Board.

United States Navigation Co. v. Cunard S. S. Co. (1932) 284 U. S. 474, 76 L. Ed. 408, 52 S. Ct. 247.

See note, "Primary Jurisdiction—Effect of Administrative Remedies on the Jurisdiction of Courts," (1938) 51 Harv. L. Rev. 1251.

⁴ *Mitchell Coal & Coke Co. v. Pennsylvania R. Co.* (1913) 230 U. S. 247, 57 L. Ed. 1472, 33 S. Ct. 916.

⁵ *Texas & P. R. Co. v. Abilene Cotton Oil Co.* (1907) 204 U. S. 426, 51 L. Ed. 553, 27 S. Ct. 350.

⁶ *Mitchell Coal & Coke Co. v. Pennsylvania R. Co.* (1913) 230 U. S. 247, 57 L. Ed. 1472, 33 S. Ct. 916.

Where no administrative question is presented, preliminary resort to the agency is not necessary.⁷

§ 215. Bases of the Doctrine.

The historical reason for the doctrine was set forth in the *Abilene Cotton Oil* case in 1907⁸ as the necessity for uniform determination of administrative questions, such as the question of reasonableness of a rate, by the single administrative agency to which that matter had been committed by Congress. It was said that without previous determination of the question by the Interstate Commerce Commission power might be exerted by courts and juries generally to determine the reasonableness of an established rate, and that the exercise of such power would tend to favoritism and collusion, to the enforcement of one rate in one jurisdiction and a different one in another.⁹ The desirability for uniform determination of adminis-

⁷ *Perkins v. Elg* (1939) 307 U. S. 325, 83 L. Ed. 1320, 59 S. Ct. 884; *Turner, D. & L. Lumber Co. v. Chicago, M., & St. P. R. Co.* (1926) 271 U. S. 259, 70 L. Ed. 934, 46 S. Ct. 530; *Pennsylvania R. Co. v. Puritan Coal Min. Co.* (1915) 237 U. S. 121, 59 L. Ed. 867, 35 S. Ct. 484; *Philadelphia Co. v. Stimson* (1912) 223 U. S. 605, 56 L. Ed. 570, 32 S. Ct. 340. See also §§ 688, 704 et seq.

⁸ *Texas & P. R. Co. v. Abilene Cotton Oil Co.* (1907) 204 U. S. 426, 51 L. Ed. 553, 27 S. Ct. 350.

⁹ "This is clearly so, for if it be that the standard of rates fixed in the mode provided by the statute could be treated on the complaint of a shipper by a court and jury as unreasonable, without reference to prior action by the Commission, finding the established rate to be unreasonable and ordering the carrier to desist in the future from violating the act, it would come to pass that a shipper might obtain relief upon the basis that the established rate was unreasonable, in the opinion of a court and jury, and thus such shipper would receive a preference or discrimina-

tion not enjoyed by those against whom the schedule of rates was continued to be enforced. This can only be met by the suggestion that the judgment of a court, when based upon a complaint made by a shipper without previous action by the Commission, would give rise to a change of the schedule rate and thus cause the new rate resulting from the action of the court to be applicable in future as to all. This suggestion, however, is manifestly without merit, and only serves to illustrate the absolute destruction of the act and the remedial provisions which it created which would arise from a recognition of the right asserted. For if, without previous action by the Commission, power might be exerted by courts and juries generally to determine the reasonableness of an established rate, it would follow that unless all courts reached an identical conclusion a uniform standard of rates in the future would be impossible, as the standard would fluctuate and vary, dependent upon the divergent conclusions reached as to reasonableness by the various courts called upon to consider the sub-

trative questions is now well established as a basis of the primary jurisdiction doctrine. Without uniform determination an administrative scheme would be frustrated.¹⁰

ject as an original question. Indeed the recognition of such a right is wholly inconsistent with the administrative power conferred upon the Commission and with the duty, which the statute casts upon that body, of seeing to it that the statutory requirement as to uniformity and equality of rates is observed. Equally obvious is it that the existence of such a power in the courts, independent of prior action by the Commission, would lead to favoritism, to the enforcement of one rate in one jurisdiction and a different one in another, would destroy the prohibitions against preferences and discrimination, and afford, moreover, a ready means by which, through collusive proceedings, the wrongs which the statute was intended to remedy could be successfully inflicted. Indeed no reason can be perceived for the enactment of the provision endowing the administrative tribunal, which the act created, with power, on due proof, not only to award reparation to a particular shipper, but to command the carrier to desist from violation of the act in the future, thus compelling the alteration of the old or the filing of a new schedule, conformably to the action of the Commission, if the power was left in courts to grant relief on complaint of any shipper, upon the theory that the established rate could be disregarded and be treated as unreasonable, without reference to previous action by the Commission in the premises." (Mr. Justice White in *Texas & P. R. Co. v. Abilene Cotton Oil Co.* (1907) 204 U. S. 426, 440, 441, 51 L. Ed. 553, 27 S. Ct. 350.)

10 Interstate Commerce Commission.

Standard Oil Co. v. United States (1931) 283 U. S. 235, 75 L. Ed. 999, 51 S. Ct. 429; * *Great Northern R. Co. v. Merchants Elevator Co.* (1922) 259 U. S. 285, 66 L. Ed. 943, 42 S. Ct. 477; * *Texas & P. R. Co. v. American Tie & Timber Co., Ltd.* (1914) 234 U. S. 138, 58 L. Ed. 1255, 34 S. Ct. 885; * *Mitchell Coal & Coke Co. v. Pennsylvania R. Co.* (1913) 230 U. S. 247, 57 L. Ed. 1472, 33 S. Ct. 916; *Robinson v. Baltimore & O. R. Co.* (1912) 222 U. S. 506, 56 L. Ed. 288, 32 S. Ct. 114; *Davis v. Krauss Bros. Lumber Co.* (D. C. E. D. La. 1928) 25 F. (2d) 888.

State Agencies.

Board of Railroad Com'rs of N. Dak. v. Great Northern Ry. Co. (1930) 281 U. S. 412, 74 L. Ed. 936, 50 S. Ct. 391.

United States Shipping Board.

United States Navigation Co. v. Cunard S. S. Co. (1932) 284 U. S. 474, 76 L. Ed. 408, 52 S. Ct. 247.

Quotations.

"The effect of the Act to Regulate Commerce, as supplemented and amended, upon the jurisdiction of courts, has been expounded in many cases heretofore decided. *Tex. & Pac. Ry. v. Abilene Cotton Co.*, 204 U. S. 426; *Balt. & Ohio R. R. v. Pitcairn Coal Co.*, 215 U. S. 481; *Robinson v. Balt. & Ohio R. R.*, 222 U. S. 506; *Mitchell Coal Co. v. Penna. R. R.*, 230 U. S. 247; *Morrisdale Coal Co. v. Penna. R. R.*, 230 U. S. 304; *Minnesota Rate Cases*, 230 U. S. 352; *Tex. & Pac. Ry. v. American Tie Co.*, 234 U. S. 138; *Penna. R. R. v. Puritan Coal Co.*, 237 U. S. 121; *Penna. R. R. v. Clark Coal Co.*, 238 U. S. 456.

A second reason has been said to be the necessity that technical matters, involving the weighing of voluminous and conflicting evidence, be determined by a body of experts.¹¹ From the beginning the very purpose for which the Interstate Commerce Commission, the first important administrative agency, was created was to bring into existence a body which, from its peculiar character, would be most fitted to decide primarily whether discrimination existed in a given

"Speaking through Mr. Justice Lamar in *Mitchell Coal Co. v. Penna. R. R.*, supra, we said (p. 255): 'The courts have not been given jurisdiction to fix rates or practices in direct proceedings, nor can they do so collaterally during the progress of a lawsuit when the action is based on the claim that unreasonable allowances have been paid. If the decision of such questions was committed to different courts with different juries the results would not only vary in degree, but might often be opposite in character—to the destruction of the uniformity in rate and practice which was the cardinal object of the statute.'

"In the *Minnesota Rate Cases*, supra, we further said (p. 419): 'The dominating purpose of the statute was to secure conformity to the prescribed standards through the examination and appreciation of the complex facts of transportation by the body created for that purpose; and, as this court has repeatedly held, it would be destructive of the system of regulation defined by the statute if the court without the preliminary action of the Commission were to undertake to pass upon the administrative questions which the statute has primarily confided to it.'

"And in *Tex. & Pac. Ry. Co. vs. American Tie Co.*, supra, the rule was thus stated (p. 146): 'It is equally clear that the controversy as to whether the lumber tariff included crossties was one primarily to be determined by the Commission in the

exercise of its power concerning tariffs and the authority to regulate conferred upon it by the statute. Indeed, we think it is indisputable that that subject is directly controlled by the authorities which establish that for the preservation of the uniformity which it was the purpose of the Act to Regulate Commerce to secure, the courts may not as an original question exert authority over subjects which primarily come within the jurisdiction of the Commission.' " (Mr. Justice McReynolds in *Loomis v. Lehigh Valley R. Co.* (1916) 240 U. S. 43, 48-50, 60 L. Ed. 517, 36 S. Ct. 228.)

11 Federal Communications Commission.

Rochester Telephone Corp. v. United States (1939) 307 U. S. 125, 89 L. Ed. 1147, 59 S. Ct. 754.

United States Shipping Board.

United States Navigation Co. v. Cunard S. S. Co. (1932) 284 U. S. 474, 76 L. Ed. 408, 52 S. Ct. 247.

Interstate Commerce Commission.

Standard Oil Co. v. United States (1931) 283 U. S. 235, 75 L. Ed. 999, 51 S. Ct. 429; * *Great Northern R. Co. v. Merchants Elevator Co.* (1922) 259 U. S. 285, 66 L. Ed. 943, 42 S. Ct. 477.

State Agencies.

Western & A. R. Co. v. Georgia Public Service Commission (1925) 267 U. S. 493, 69 L. Ed. 753, 45 S. Ct. 409.

See Harold J. Laski in "The Limitations of the Expert," (December, 1930) 162 *Harper's Magazine* 101.

case.¹² Thus the question whether the continuance of an industrial track violates the Interstate Commerce Act as unduly discriminatory is one that involves issues not primarily for the courts, but for the Interstate Commerce Commission. It requires a consideration by experts of the benefit of the use of such a siding, as compared with other sidings, in connection with the rates in interstate commerce, to determine whether there is undue discrimination between shippers. The railroad company is therefore in no position to appeal to the courts on this ground until it has invoked the investigation and decision of the Interstate Commerce Commission upon the concrete facts in a proper manner.¹³ If the Commission finds such discrimination its order may not be specifically to discontinue service, but to remove the discrimination, giving discretion to the company to adopt a satisfactory method of meeting the requirement.¹⁴

A third reason would appear to be a rule of judicial administration under the separation of powers to the effect that administrative remedies, which are legislative in character, should be exhausted on administrative questions, which are likewise legislative in character, before judicial relief may be sought.¹⁵ This reason has perhaps been overlooked because historically the rule arose in a case which necessarily fell within the judicial power—a suit for damages for exaction of unreasonable rates—to which the separation of powers could not apply.¹⁶ It would seem that where this is not involved, as with statutory rights newly created, that legislative remedies should be exhausted before judicial relief is sought, as a third basis of the doctrine. And this reason, like the first one and perhaps the second, necessarily goes back to the separation of powers as the underlying foundation of the doctrine.

¹² *United States v. Louisville & N. R. Co.* (1914) 235 U. S. 314, 59 L. Ed. 245, 35 S. Ct. 113.

¹³ *Western & A. R. Co. v. Georgia Public Service Commission* (1925) 267 U. S. 493, 69 L. Ed. 753, 45 S. Ct. 409.

¹⁴ *Western & A. R. Co. v. Georgia Public Service Commission* (1925) 267 U. S. 493, 69 L. Ed. 753, 45 S. Ct. 409.

¹⁵ The primary jurisdiction doctrine and the rule requiring exhaus-

tion of administrative remedies before seeking judicial relief are closely related. The latter is based primarily on the ground that legislative remedies should be exhausted before judicial remedies are sought, and the reason would seem to apply equally here. See § 226 et seq.

¹⁶ *Texas & P. R. Co. v. Abilene Cotton Oil Co.* (1907) 204 U. S. 426, 51 L. Ed. 553, 27 S. Ct. 350.

§ 216. Rule Applies Regardless of Form of Judicial Relief Sought.

The practical application of the doctrine ordinarily requires dismissal, for want of jurisdiction, of suits in the courts where the issues involve administrative questions that have not been determined by the appropriate agency or agencies to which they have been committed for determination. The doctrine so applies regardless of the form of action, or type of judicial relief sought, including suits for damages against carriers where the real issue is an administrative question such as the reasonableness of a rate,¹⁷ or operating practice,¹⁸ the adequacy of transportation facilities,¹⁹ or whether there has been undue discrimination;²⁰ suits for injunction,²¹ or a writ of mandamus;²² or for an accounting between parties;²³ suits under the Anti-Trust

¹⁷ *Mitchell Coal & Coke Co. v. Pennsylvania R. Co.* (1913) 230 U. S. 247, 57 L. Ed. 1472, 33 S. Ct. 916; *Southern R. Co. v. Tift* (1907) 206 U. S. 428, 51 L. Ed. 1124, 27 S. Ct. 709; *Texas & P. R. Co. v. Abilene Cotton Oil Co.* (1907) 204 U. S. 426, 51 L. Ed. 553, 27 S. Ct. 350; *Norge Corporation v. Long Island R. Co.* (C. C. A. 2d, 1935) 77 F. (2d) 312, cert. den. 296 U. S. 616, 80 L. Ed. 437, 56 S. Ct. 137; *Woodrich v. Northern Pac. R. Co.* (C. C. A. 8th, 1934) 71 F. (2d) 732, 97 A. L. R. 401; *El Paso & S. W. R. Co. v. Phelps-Dodge Mercantile Co.* (C. C. A. 9th, 1935) 75 F. (2d) 873; **Carrollton Excelsior & Fuel Co., Ltd. v. New Orleans & N. E. R. Co.* (C. C. A. 5th, 1934) 69 F. (2d) 691, cert. den. 293 U. S. 581, 79 L. Ed. 677, 55 S. Ct. 94; *Jeanneret v. Chicago, B. & Q. R. Co.* (C. C. A. 7th, 1927) 17 F. (2d) 978, cert. den. 275 U. S. 531, 72 L. Ed. 410, 48 S. Ct. 29.

¹⁸ *Pennsylvania R. Co. v. Clark Bros. Coal Min. Co.* (1915) 238 U. S. 456, 59 L. Ed. 1406, 35 S. Ct. 896; *Morrisdale Coal Co. v. Pennsylvania R. Co.* (1913) 230 U. S. 304, 57 L. Ed. 1494, 33 S. Ct. 938,

¹⁹ *Louisville & N. R. Co. v. Cory* (C. C. A. 6th, 1931) 54 F. (2d) 8.

²⁰ *Northern Pac. R. Co. v. Solum* (1918) 247 U. S. 477, 62 L. Ed. 1221, 38 S. Ct. 550; *Robinson v. Baltimore & O. R. Co.* (1912) 222 U. S. 506, 56 L. Ed. 288, 32 S. Ct. 114; *Bodine & Clark Livestock Commission Co. v. Great Northern R. Co.* (C. C. A. 9th, 1933) 63 F. (2d) 472, cert. den. 290 U. S. 629, 78 L. Ed. 548, 54 S. Ct. 48.

²¹ *Director General v. Viscose Co.* (1921) 254 U. S. 498, 65 L. Ed. 372, 41 S. Ct. 151; *Atlantic Coast Line R. Co. v. Hampton & Branchville R. Co.* (C. C. A. 4th, 1936) 80 F. (2d) 797.

²² *St. Louis, B. & M. R. Co. v. Brownsville Nav. Dist.* (1938) 304 U. S. 295, 82 L. Ed. 1357, 58 S. Ct. 868; **Baltimore & O. R. Co. v. United States ex rel. Piteairn Coal Co.* (1910) 215 U. S. 481, 54 L. Ed. 292, 30 S. Ct. 164; *United States ex rel. Connor v. District of Columbia* (1932) 61 App. D. C. 288, 61 F. (2d) 1015.

²³ *Atlantic Coast Line R. Co. v. Boston & M. R. Co.* (D. C. Mass. 1937) 18 F. Supp. 886.

Laws, either civil²⁴ or criminal;²⁵ suits in state courts;²⁶ suits for a writ of habeas corpus;²⁷ or any other form of action.²⁸ In a railroad's suit for freight charges the shipper may not assert as a defense that the rates charged were unreasonable. He must attack the reasonableness of the rates before the Interstate Commerce Commission, and not in the courts.²⁹ Where an agency makes a rate order, with the direction that, at the end of six months, the utility can apply again for such relief as results justify, such application must be made before a bill to enjoin the agency may thereafter be brought in an equity court.³⁰ The form of judicial remedy is not significant. The important factor is whether the issues in a suit in the courts involve an administrative question which has not been determined by the agency to whose primary jurisdiction its determination has been committed by the legislature.

§ 217. — Dismissal or Holding Suit in Abeyance.

No useful purpose may be secured by holding a suit in abeyance pending the conclusion of contemplated administrative proceedings, where the court is asked to determine an administrative question.³¹ But where, in a suit between private parties of which the court has jurisdiction, it appears that an administrative question whose determination has been committed to a particular agency, is involved, the court should stay its hand pending determination of that question by the appropriate agency, and retain jurisdiction. It should not dismiss the cause.³²

²⁴ Terminal Warehouse Co. v. Pennsylvania R. Co. (1936) 297 U. S. 500, 80 L. Ed. 827, 56 S. Ct. 546; United States Navigation Co. v. Cunard S. S. Co. (1932) 284 U. S. 474, 76 L. Ed. 408, 52 S. Ct. 247.

²⁵ United States v. Pacific & A. R. & Nav. Co. (1913) 228 U. S. 87, 57 L. Ed. 742, 33 S. Ct. 443.

²⁶ Midland Valley R. Co. v. Barkley (1928) 276 U. S. 482, 72 L. Ed. 664, 48 S. Ct. 342.

²⁷ United States ex rel. Loucas v. Commissioner of Immigration (D. C. S. D. N. Y. 1931) 49 F. (2d) 473.

²⁸ Watson v. United States (C. C. A. 5th, 1939) 107 F. (2d) 1. See Plested v. Abbey (1913) 228 U. S. 42,

57 L. Ed. 724, 33 S. Ct. 503; Backus-Brooks Co. v. Northern Pac. R. Co. (C. C. A. 8th, 1927) 21 F. (2d) 4, cert. den. 275 U. S. 562, 72 L. Ed. 427, 48 S. Ct. 120.

²⁹ Davis v. Krauss Bros. Lumber Co. (D. C. E. D. La. 1928) 25 F. (2d) 888.

³⁰ Henderson Water Co. v. Corporation Commission (1925) 269 U. S. 278, 70 L. Ed. 273, 46 S. Ct. 112.

³¹ St. Louis, B. & M. R. Co. v. Brownsville Nav. Dist. (1938) 304 U. S. 295, 82 L. Ed. 1357, 58 S. Ct. 868.

³² General American Tank Car Corp. v. El Dorado Terminal Co. (1940) 308 U. S. 422, 84 L. Ed. 361, 60 S. Ct. 325, rehearing denied 309 U. S. 694,

§ 218. Converse Situation: Suits Based on Administrative Action.

One cannot recover in a suit based on administrative action until all administrative questions essential to his case have been appropriately determined by the agency.³³

Thus, a suit for damages for exaction of unreasonable rates and discriminatory practices must be based on a direct and explicit determination that the rates and practices complained of were unjust and unreasonable in themselves and in relation to each other.³⁴ The primary jurisdiction doctrine may be invoked whenever, as by answer in a suit to enforce an administrative order, an issue is raised which is within the primary jurisdiction of an administrative agency.³⁵

II. RESPECTING JUDICIAL QUESTIONS

§ 219. Primary Jurisdiction Traditionally in the Courts. Procedural Commitment to Agency.

Judicial questions are uniquely for the exercise of judicial power, that is, independent decision by the courts.³⁶ Thus primary jurisdiction to decide judicial questions is traditionally in the courts. This principle holds respecting controversies with administrative agencies, as is evidenced by the cases where an injunction or writ of mandamus is sought to compel an agency to act in accordance with appropriate decision of one or more judicial questions, no questions of interference with administrative proceedings or judicial review of administrative action being involved.³⁷

This traditional rule has, however, been complicated by the nature of the machinery of administrative schemes. Administrative questions, such as unfair labor or trade practices, and the many others, have been created by statute and their determination exclusively committed to the primary jurisdiction of an administrative agency.³⁸ Determination of these questions, however, cannot be made in particular

84 L. Ed. 1035, 60 S. Ct. 465; *Mitchell Coal & Coke Co. v. Pennsylvania R. Co.* (1913) 230 U. S. 247, 57 L. Ed. 1472, 33 S. Ct. 916.

³³ *Carrollton Excelsior & Fuel Co., Ltd. v. New Orleans & N. E. R. Co.* (C. C. A. 5th, 1934) 69 F. (2d) 691, cert. den. 293 U. S. 581, 79 L. Ed. 677, 55 S. Ct. 94.

³⁴ *Carrollton Excelsior & Fuel Co. Ltd. v. New Orleans & N. E. R. Co.*

(C. C. A. 5th, 1934) 69 F. (2d) 691, cert. den. 293 U. S. 581, 79 L. Ed. 677, 55 S. Ct. 94.

³⁵ *National Labor Relations Board v. Lund* (C. C. A. 8th, 1939) 103 F. (2d) 815.

³⁶ See §§ 41, 423 et seq.

³⁷ See §§ 688, 704 et seq.

³⁸ See § 521.

cases without requiring the agency to venture a decision upon one or more judicial questions bound up with them.³⁹ Because of the fundamental nature of the right to the independent judgment of a court on a judicial question, courts have often been called upon to enjoin or otherwise interfere with projected administrative proceedings upon the ground that a judicial question, decided in a particular way, is determinative of the administrative proceeding and the entire controversy, or of the right of the agency to bring the proceeding. Unless a judicial question is bound up in an administrative matter, exclusively committed by statute for initial decision to the primary jurisdiction of an administrative agency, primary as well as final jurisdiction to decide it is in the courts.⁴⁰ But if a matter has been exclusively committed to the jurisdiction of an administrative agency, a well-settled rule of judicial administration requires that the agency hear and determine the administrative questions and, in addition, venture an initial decision on whatever judicial questions are involved. A court may not be substituted for the agency which Congress has declared must first hear and determine as to judicial questions bound up with administrative subject matter. Accordingly, no judicial relief against an administrative agency, which involves the decision of such judicial questions, may be obtained until the prescribed exclusive administrative remedy is exhausted.⁴¹ The rule applies whether

³⁹ See §§ 73, 423 et seq.

⁴⁰ See §§ 73, 688, 704 et seq.

Interstate Commerce Commission.

W. P. Brown & Sons Lumber Co. v. Louisville & N. R. Co. (1937) 299 U. S. 393, 81 L. Ed. 301, 57 S. Ct. 265; Great Northern R. Co. v. Merchants Elevator Co. (1922) 259 U. S. 285, 66 L. Ed. 943, 42 S. Ct. 477.

United States Maritime Commission.

New York & Porto Rico S. S. Co. v. United States (D. C. E. D. N. Y. 1940) 32 F. Supp. 538.

United States Shipping Board.

United States Navigation Co. v. Cunard S. S. Co. (1932) 284 U. S. 474, 76 L. Ed. 408, 52 S. Ct. 247.

⁴¹ **Alien Cases.**

United States v. Sing Tuck (1904) 194 U. S. 161, 48 L. Ed. 917, 24 S. Ct. 621.

Board of Review (Treasury Department).

Anniston Mfg. Co. v. Davis (1937) 301 U. S. 337, 81 L. Ed. 1143, 57 S. Ct. 816.

Commissioner of Internal Revenue.

See United States v. Felt & Tarant Mfg. Co. (1931) 283 U. S. 269, 75 L. Ed. 1025, 51 S. Ct. 376.

Federal Trade Commission.

Primary jurisdiction to the extent indicated respecting the judicial questions as to what constitutes "unfair methods of competition" under the Federal Trade Commission Act (15 USCA 41 et seq.) has been explicitly vested in an administrative agency, Federal Trade Commission v. Algoma Lumber Co. (1934) 291 U. S. 67, 78 L. Ed. 655, 54 S. Ct. 315; Federal Trade Commission v. R. F.

judicial relief is sought by suit in equity⁴² or action at law.⁴³

Thus an administrative agency can not be enjoined from holding a "hearing" under the National Labor Relations Act on the ground that

Keppel & Bro. (1934) 291 U. S. 304, 78 L. Ed. 814, 54 S. Ct. 423.

National Labor Relations Board.

* Myers v. Bethlehem Shipbuilding Corp. (1938) 303 U. S. 41, 82 L. Ed. 638, 58 S. Ct. 459; Newport News Shipbuilding & Dry Dock Co. v. Schauffler (1938) 303 U. S. 54, 82 L. Ed. 646, 58 S. Ct. 466; Elliott v. El Paso Electric Co. (C. C. A. 5th, 1937) 88 F. (2d) 505, cert. den. 301 U. S. 710, 81 L. Ed. 1363, 57 S. Ct. 945.

United States Shipping Board.

See United States Navigation Co. v. Cunard S. S. Co. (1932) 284 U. S. 474, 76 L. Ed. 408, 52 S. Ct. 247.

Quotations.

"Third. The Corporation contends that, since it denies that interstate or foreign commerce is involved and claims that a hearing would subject it to irreparable damage, rights guaranteed by the Federal Constitution will be denied unless it be held that the District Court has jurisdiction to enjoin the holding of a hearing by the Board. So to hold would, as the Government insists, in effect substitute the District Court for the Board as the tribunal to hear and determine what Congress declared the Board exclusively should hear and determine in the first instance. The contention is at war with the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted. That rule has been repeatedly acted on in cases where, as here, the contention is made that the administrative body lacked power over the subject matter.

"Obviously, the rule requiring exhaustion of the administrative remedy

cannot be circumvented by asserting that the charge on which the complaint rests is groundless and that the mere holding of the prescribed administrative hearing would result in irreparable damage. Lawsuits also often prove to have been groundless; but no way has been discovered of relieving a defendant from the necessity of a trial to establish the fact." (Mr. Justice Brandeis in Myers v. Bethlehem Shipbuilding Corp. (1938) 303 U. S. 41, 50, 82 L. Ed. 638, 58 S. Ct. 459.)

"But if the act is valid, even if ineffectual on this single point, then it points out a mode of procedure which must be followed before there can be a resort to the courts. In order to act at all the executive officer must decide upon the question of citizenship. If his jurisdiction is subject to being upset, still it is necessary that he should proceed if he decides that it exists. An appeal is provided by the statute. The first mode of attaching his decision is by taking that appeal. If the appeal fails it then is time enough to consider whether upon a petition showing reasonable cause there ought to be a further trial upon habeas corpus." (Mr. Justice Holmes in United States v. Sing Tuck (1904) 194 U. S. 161, 167, 168, 48 L. Ed. 917, 24 S. Ct. 621.)

⁴² Myers v. Bethlehem Shipbuilding Corp. (1938) 303 U. S. 41, 82 L. Ed. 638, 58 S. Ct. 459, and cases cited in note 9 to the opinion; Elliott v. El Paso Electric Co. (C. C. A. 5th, 1937) 88 F. (2d) 505, cert. den. 301 U. S. 710, 81 L. Ed. 1363, 57 S. Ct. 945.

⁴³ Myers v. Bethlehem Shipbuilding Corp. (1938) 303 U. S. 41, 82 L. Ed.

it had no jurisdiction, prior to an initial decision of that question by the agency. If the agency holds that it has jurisdiction, but upon judicial review in the Circuit Court of Appeals it is found that it did not have jurisdiction, its order will be denied enforcement or set aside.⁴⁴ And suit may not be brought for recovery of taxes unconstitutionally collected, where an exclusive administrative remedy is provided for the initial determination of all judicial questions involved.⁴⁵ Although the Court of Claims is a legislative court, its review is treated for many purposes, such as appeal to the Supreme Court, as judicial. And the same rules as to exhaustion of administrative remedies apply. Thus, on appeal in tax cases, the claimant cannot dispense with the statutory requirement that he file a claim with the Commissioner, because of the likelihood, due to previous Treasury rulings, that it will be rejected.⁴⁶

§ 220. Practical Basis of Rule Requiring Initial Administrative Decision of Certain Judicial Questions.

Although judicial questions are for the courts, many of them require a conclusion of law to be made from findings on administrative questions, that is findings of circumstantial facts, which must be determined from proof adduced. Such administrative questions, even if not specifically designated in the statute as being for administrative decision, are so designated by implication where a judicial question necessarily based on them is committed for exclusive initial administrative decision. It is thus logical for decision of judicial questions dependent upon determination of administrative questions to await primary determination by the agency, in order that proper proof be adduced and the basic administrative questions be properly determined by the administrative agency. To hold otherwise and sanction judicial interference with the administrative determination of matters exclusively committed to an agency would result in initial judicial decision of the basic administrative questions upon which

638, 58 S. Ct. 459; *Anniston Mfg. Co. v. Davis* (1937) 301 U. S. 337, 81 L. Ed. 1143, 57 S. Ct. 816.

⁴⁴ *Myers v. Bethlehem Shipbuilding Corp.* (1938) 303 U. S. 41, 82 L. Ed. 638, 58 S. Ct. 459; *Newport News Shipbuilding & Dry Dock Co. v. Schauffer* (1938) 303 U. S. 54, 82 L. Ed. 646, 58 S. Ct. 466.

⁴⁵ *Anniston Mfg. Co. v. Davis* (1937) 301 U. S. 337, 81 L. Ed. 1143, 57 S. Ct. 816; **First Nat. Bank v. Weld County* (1924) 264 U. S. 450, 68 L. Ed. 784, 44 S. Ct. 385.

⁴⁶ *United States v. Felt & Tarrant Mfg. Co.* (1931) 283 U. S. 269, 75 L. Ed. 1025, 51 S. Ct. 376.

decision of judicial questions depends. This would be plainly contrary to the mandate of the statute.

To illustrate, in the *Myers* case⁴⁷ the judicial question was that of jurisdiction which in turn depended upon the judicial question as to whether or not interstate commerce was appropriately involved. The company claimed that it was not involved, that therefore the agency had no jurisdiction, and asked that the administrative proceedings pending be restrained. This contention was rejected, leaving the way open for the agency to take proof and make findings upon the basic administrative questions upon which the judicial question of interstate commerce depended. It is thus common for the National Labor Relations Board to take proof and determine such basic administrative questions as the nature of the Company's business, its reception of goods shipped from without the state, its shipment of goods to other states, and the percentages thereof.⁴⁸ These are basic questions upon which hangs the legal conclusion or judicial question as to interstate commerce.⁴⁹

This administrative process of taking proof and making determinations of the basic administrative questions upon which the judicial question of jurisdiction depends, together with initial administrative decision of that judicial question, has been termed the making of an "investigation."⁵⁰

The rule requiring that judicial questions of the character discussed be initially decided by an administrative agency in an appropriate administrative proceeding, is not strictly a rule of primary jurisdiction. Although its effect is to place primary jurisdiction for initial decision of such judicial questions in an agency, its foundation is the doctrine that administrative remedies must be exhausted before ju-

⁴⁷ *Myers v. Bethlehem Shipbuilding Corp.* (1938) 303 U. S. 41, 82 L. Ed. 638, 58 S. Ct. 459. S. 58, 81 L. Ed. 921, 57 S. Ct. 645, 108 A. L. R. 1352.

⁴⁸ See *National Labor Relations Board v. Jones & Laughlin Steel Corp.* (1937) 301 U. S. 1, 81 L. Ed. 893, 57 S. Ct. 615, 108 A. L. R. 1352; *National Labor Relations Board v. Fruehauf Trailer Co.* (1937) 301 U. S. 49, 81 L. Ed. 918, 57 S. Ct. 642, 108 A. L. R. 1352; *National Labor Relations Board v. Friedman-Harry Marks Clothing Co.* (1937) 301 U. S. 58, 81 L. Ed. 921, 57 S. Ct. 645, 108 A. L. R. 1352. ⁴⁹ *Associated Press v. National Labor Relations Board* (1937) 301 U. S. 103, 81 L. Ed. 953, 57 S. Ct. 650; *National Labor Relations Board v. Jones & Laughlin Steel Corp.* (1937) 301 U. S. 1, 81 L. Ed. 893, 57 S. Ct. 615, 108 A. L. R. 1352. ⁵⁰ *Newport News Shipbuilding & Dry Dock Co. v. Schauffler* (1938) 303 U. S. 54, 82 L. Ed. 646, 58 S. Ct. 466.

dicial relief is sought.⁵¹ This provides a clear illustration showing that the primary jurisdiction doctrine and the rule requiring exhaustion of administrative remedies have the same source.

What has been said in this chapter should be contrasted with the right to a trial *de novo* on the facts and law where questions of constitutional power and right are raised.^{51a}

§ 221. Irreparable Injury Immaterial.

The fact that threatened administrative proceedings will plainly subject the complainant to irreparable injury if improperly instituted is no ground for circumventing the rule requiring exhaustion of an exclusively committed administrative remedy which involves judicial questions. This is only one of the hardships inherent in the judicial system and is *damnum absque injuria*. Administrative complaints, like complaints in judicial proceedings, often prove to be groundless, but no way has yet been discovered of enabling a defendant to avoid an appropriate trial to establish that fact.⁵²

§ 222. Rule Applies Even Though Agency Could Make Private Instead of Public Investigation.

The holding of public hearings by an administrative agency in the course of an investigation is obviously fraught with practical dangers to parties thereto, which could be avoided by the making of a private investigation. These dangers may well cause irreparable injury. Nevertheless, the fact that these dangers and irreparable injury could be avoided by making a private investigation, also authorized by statute, is no ground to prevent the agency from making a public investigation where it is so authorized.⁵³ A more pungent reason, such as the possibility of disclosure of trade secrets, would be necessary to render arbitrary an agency's decision, in the exercise of its discretion, to hold a public rather than a secret hearing.⁵⁴ The question of holding a public or private investigation is in the nature of an adminis-

⁵¹ *Myers v. Bethlehem Shipbuilding Corp.* (1938) 303 U. S. 41, 82 L. Ed. 638, 58 S. Ct. 459. See also § 226 et seq.

^{51a} See § 262 et seq.

⁵² *Myers v. Bethlehem Shipbuilding Corp.* (1938) 303 U. S. 41, 82 L. Ed. 638, 58 S. Ct. 459.

⁵³ *Newport News Shipbuilding & Dry Dock Co. v. Schauffler* (1938) 303 U. S. 54, 82 L. Ed. 646, 58 S. Ct. 466; *E. Griffiths Hughes, Inc. v. Federal Trade Commission* (1933) 61 App. D. C. 386, 63 F. (2d) 362.

⁵⁴ *E. Griffiths Hughes, Inc. v. Federal Trade Commission* (1933) 61 App. D. C. 386, 63 F. (2d) 362.

trative question, to which the doctrine of administrative finality applies.⁵⁵

§ 223. Declaratory Judgment Act Does Not Mitigate Force of Rule.

The new power to make a declaratory decree does not authorize a court of equity by declaration to interfere with administrative proceedings at a point where it would not, under settled principles, have interfered with or stopped them under its power to enjoin.⁵⁶

§ 224. Judicial Questions Which Have Been Exclusively Committed for Initial Administrative Decision.

The following judicial questions have been held to have been exclusively committed to administrative agencies for initial decision: whether a party is engaged in interstate commerce;⁵⁷ whether or not a party is entitled to recover taxes unconstitutionally collected;⁵⁸ whether the relationship of master and servant exists,⁵⁹ and whether an injury occurred upon the navigable waters of the United States.⁶⁰ Although questions as to the meaning of a tariff may be either administrative or judicial depending upon whether technical matters are involved,⁶¹ an appropriate administrative agency always has jurisdiction over a controversy involving the meaning of a tariff.⁶²

§ 225. Limitation of Rule.

Judicial questions, such as those of statutory construction, which are not bound up with or do not depend upon the determination of basic administrative questions could probably not be lawfully committed for initial administrative decision, as no principle of exhaustion of an administrative remedy is applicable. For instance, if a com-

⁵⁵ *E. Griffiths Hughes, Inc. v. Federal Trade Commission* (1933) 61 App. D. C. 386, 63 F. (2d) 362.

⁵⁶ *Bradley Lumber Co. of Arkansas v. National Labor Relations Board* (C. C. A. 5th, 1936) 84 F. (2d) 97, cert. den. 299 U. S. 559, 81 L. Ed. 411, 57 S. Ct. 21. See *Gully v. Interstate Natural Gas Co., Inc.* (C. C. A. 5th, 1936) 82 F. (2d) 145.

⁵⁷ *Myers v. Bethlehem Shipbuilding Corp.* (1938) 303 U. S. 41, 82 L. Ed. 638, 58 S. Ct. 459.

⁵⁸ *Anniston Mfg. Co. v. Davis* (1937) 301 U. S. 337, 81 L. Ed. 1143, 57 S. Ct. 816.

⁵⁹ *Crowell v. Benson* (1932) 285 U. S. 22, 76 L. Ed. 598, 52 S. Ct. 285.

⁶⁰ *Crowell v. Benson* (1932) 285 U. S. 22, 76 L. Ed. 598, 52 S. Ct. 285.

⁶¹ See § 474.

⁶² *Chicago Great Western R. Co. v. Farmers' Shipping Ass'n* (C. C. A. 10th, 1932) 59 F. (2d) 657. See also § 474.

plainant in equity alleged facts showing that irreparable injury would result from being forced to defend impending administrative proceedings, and that the requisite administrative procedure was inappropriate,⁶³ or that provisions for judicial review were inadequate, or that any other judicial question not bound up in an administrative "investigation," when properly decided, would obviate the necessity of administrative proceedings, he should be entitled to appropriate judicial relief without the necessity of exhausting the administrative remedy.^{63a}

⁶³ See *Myers v. Bethlehem Shipbuilding Corp.* (1938) 303 U. S. 41, 82 L. Ed. 638, 58 S. Ct. 459; *Anniston Mfg. Co. v. Davis* (1937) 301 U. S. 337, 81 L. Ed. 1143, 57 S. Ct. 816.

^{63a} See §§ 688, 704.

CHAPTER 16

EXHAUSTION OF ADMINISTRATIVE REMEDIES

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§ 226. Introduction.

This chapter should be read in connection with the preceding chapter on the primary jurisdiction doctrine, for that principle and the rule requiring exhaustion of administrative remedies have a common source adequately expressed by a mere statement of the latter rule. Also, in reading the cases, it should be borne in mind that the opinions do not always use language precise enough to distinguish between the two principles. The holding of any case, however, should plainly demonstrate which rule is involved. The primary jurisdiction doctrine re-

quires that administrative questions be initially determined by the appropriate agency. The rule requiring exhaustion of administrative remedies compels pursuit of any further administrative method available for modification or change of a determination already made, sometimes in the nature of an administrative appeal.¹

I. RESPECTING ADMINISTRATIVE QUESTIONS

§ 227. In General.

We have seen that the primary jurisdiction doctrine requires that administrative questions be determined by agencies rather than courts.² The determination of these questions by administrative agencies is a legislative process. And if, after an initial determination, further administrative remedies are available for presenting other complaints not previously made relating to the initial determination, or for presenting the same complaint to a higher agency, the legislative process is not complete until the further administrative remedies have been exhausted.³ It is a rule of substance that the legislative process must be completed before judicial relief is sought, and any specific complaint of an administrative nature must first be addressed to and

¹ See § 213 et seq.

² See § 213.

³ "We are of opinion that the appellee failed to exhaust its administrative remedy before applying to the District Court for injunctive relief. The granting and revocation of permits is an exercise by the appellant of delegated legislative power. Section 4038 of the Code (*supra*) confers on any interested person dissatisfied with a finding or decision by the commissioner, the right within thirty days to bring an action against him in a state district court to vacate his order and set it aside as unjust or unreasonable, and directs that on the hearing the judge 'may set aside, modify or confirm said . . . decision as the evidence and the rules or (*sic*) equity may require.' The section confers the right to appeal to the State Supreme Court from the judgment of the trial court. Clearly the function of the state district court under the statutory

mandate is not solely judicial, that is, to set aside a decision of the commissioner if arbitrary or unreasonable and hence violative of constitutional rights. The duty is laid on the court to examine the evidence presented and either to set aside or to modify or to affirm the commissioner's order, as the proofs may require. The legislative process remains incomplete until the action of that court shall have become final. *Prentiss v. Atlantic Coast Line*, 211 U. S. 210, 229-230; *Pacific Live Stock Co. v. Lewis*, 241 U. S. 440, 444, 450-451. And the capacity in which the court acts is none the less administrative because the proceeding is designated as a suit in equity instead of by appeal. *Keller v. Potomac Electric Power Co.*, 261 U. S. 428, 438-442." (Mr. Justice Roberts in *Porter v. Investors Syndicate* (1932) 286 U. S. 461, 468, 76 L. Ed. 1226, 52 S. Ct. 617.)

carried through such legislative machinery as is available. The fact that some sort of administrative determination has been made obviously places no barriers across related legislative pathways which remain untrodden.

Hence a supplementary rule of judicial administration requires that, despite an initial administrative determination, any further administrative remedies available respecting related grounds of complaint not previously addressed to the appropriate agency must be exhausted before those complaints may be made the subject of judicial inquiry. Or if an administrative appeal lies to a higher agency respecting the same complaint, it must be likewise exhausted. These conditions must be met before seeking the extraordinary relief of a court of equity,⁴ a writ of mandamus⁵ or habeas corpus,⁶ relief in an

4 Federal Communications Commission.

Red River Broadcasting Co. v. Federal Communications Commission (1938) 69 App. D. C. 1, 98 F. (2d) 282, cert. den. 305 U. S. 625, 83 L. Ed. 400, 59 S. Ct. 86.

Interstate Commerce Commission.

United States v. Illinois Cent. R. Co. (1934) 291 U. S. 457, 78 L. Ed. 909, 54 S. Ct. 471; Louisville & N. R. Co. v. United States (D. C. N. D. Ill., E. Div., 1934) 10 F. Supp. 185; Fitzhenry v. Erie R. Co. (D. C. S. D. N. Y. 1934) 7 F. Supp. 880; Birmingham Slag Co. v. United States (D. C. N. D. Ala., S. Div., 1935) 11 F. Supp. 486. See Algoma Coal & Coke Co. v. United States (D. C. E. D. Va. 1935) 11 F. Supp. 487.

National Bituminous Coal Commission.

Mallory Coal Co. v. National Bituminous Coal Commission (1938) 69 App. D. C. 166, 99 F. (2d) 399.

National Labor Relations Board.

See Myers v. Bethlehem Shipbuilding Corp. (1938) 303 U. S. 41, 82 L. Ed. 638, 58 S. Ct. 459.

State Agencies.

* Natural Gas Pipeline Co. v. Slatery (1937) 302 U. S. 300; 82 L. Ed. 276, 58 S. Ct. 199; Hegeman Farms Corp. v. Baldwin (1934) 293 U. S. 163,

79 L. Ed. 259, 55 S. Ct. 7; Utley v. St. Petersburg (1934) 292 U. S. 106, 78 L. Ed. 1155, 54 S. Ct. 593, rehearing denied 292 U. S. 604, 78 L. Ed. 1466, 54 S. Ct. 712; P. F. Petersen Baking Co. v. Bryan (1934) 290 U. S. 570, 78 L. Ed. 505, 54 S. Ct. 277, 90 A. L. R. 1285; *Porter v. Investors Syndicate (1932) 286 U. S. 461, 76 L. Ed. 1226, 52 S. Ct. 617; St. Louis-San Francisco R. Co. v. Alabama Public Service Commission (1929) 279 U. S. 560, 73 L. Ed. 843, 49 S. Ct. 383; Gilchrist v. Interborough Rapid Transit Co. (1929) 279 U. S. 159, 73 L. Ed. 652, 49 S. Ct. 282; Western & A. R. Co. v. Georgia Public Service Commission (1925) 267 U. S. 493, 69 L. Ed. 753, 45 S. Ct. 409; Farncomb v. Denver (1920) 252 U. S. 7, 64 L. Ed. 424, 40 S. Ct. 271; Red "C" Oil Mfg. Co. v. Board of Agriculture (1912) 222 U. S. 380, 56 L. Ed. 240, 32 S. Ct. 152; *Prentiss v. Atlantic Coast Line Co. (1908) 211 U. S. 210, 53 L. Ed. 150, 29 S. Ct. 67; City of El Paso v. Texas Cities Gas Co. (C. C. A. 5th, 1938) 100 F. (2d) 501, cert. den. 306 U. S. 650, 83 L. Ed. 1049, 59 S. Ct. 592; Columbia Ry. Gas & Electric Co. v. Blease (D. C. E. D. S. Car. 1927) 42 F. (2d) 463; Hawthorne v. Fisher

action at law,⁷ or any other type of judicial relief.⁸ Where an appeal lies to a higher agency, the rule applies even though the administrative action assailed is invalid on its face.⁹ And it may not be circumvented by alleging in court that the agency intends to deny further administrative relief if it should be sought.¹⁰ In support of such a contention alleged threatening newspaper stories and unbecoming declarations by opposing counsel cannot be regarded as of grave importance.¹¹ Courts will not issue injunctions against administrative officers on the mere apprehension that they will not do their duty or will not follow the law.¹²

§ 228. Examples of Rule.

Thus a tentative order which is to take effect only after hearing if a hearing is requested may not be assailed judicially until the administrative process is complete.¹³ A court will not consider the claim that an order of a state agency, made without hearing, requiring a utility to furnish statistical data would require so heavy an expenditure as to be arbitrary or otherwise unlawful, where an available

(D. C. N. D. Tex., Dallas Div., 1940) 33 F. Supp. 891; *Sunray Oil Co. v. Thompson* (D. C. N. D. Tex. 1936) 13 F. Supp. 867. See *Blackmore v. Public Service Commission* (D. C. M. D. Pa. 1935) 12 F. Supp. 751, appeal dismissed 299 U. S. 617, 81 L. Ed. 455, 57 S. Ct. 757.

Law Review Articles.

See Raoul Berger in "Exhaustion of Administrative Remedies," (1939) 48 Yale L. Jour. 981; note, "Primary Jurisdiction—Effect of Administrative Remedies on the Jurisdiction of Courts," (1938) 51 Harv. L. Rev. 1251; "Administrative Action as a Prerequisite of Judicial Relief," (1935), 35 Columbia L. Rev. 230.

⁵ *Goldsmith v. Board of Tax Appeals* (1926) 270 U. S. 117, 70 L. Ed. 494, 46 S. Ct. 215.

⁶ See *United States v. Sing Tuck* (1904) 194 U. S. 161, 48 L. Ed. 917, 24 S. Ct. 621. Compare *Nishimura Ekiu v. United States* (1892) 142 U. S. 651, 35 L. Ed. 1146, 12 S. Ct. 336. *United States ex rel. Petersen v.*

Commissioner of Immigration (D. C. S. D. N. Y. 1932) 1 F. Supp. 735.

⁷ *First Nat. Bank v. Weld County* (1924) 264 U. S. 450, 68 L. Ed. 784, 44 S. Ct. 385. Compare *Patterson v. Louisville & N. R. Co.* (1925) 269 U. S. 1, 70 L. Ed. 131, 46 S. Ct. 8.

⁸ *Catholic Society of Religious and Literary Education v. Madison County* (C. C. A. 4th, 1935) 74 F. (2d) 848.

⁹ *City of El Paso v. Texas Cities Gas Co.* (C. C. A. 5th, 1938) 100 F. (2d) 501, cert. den. 306 U. S. 650, 83 L. Ed. 1049, 59 S. Ct. 592.

¹⁰ *Gilchrist v. Interborough Rapid Transit Co.* (1929) 279 U. S. 159, 73 L. Ed. 652, 49 S. Ct. 282. See also § 755.

¹¹ *Gilchrist v. Interborough Rapid Transit Co.* (1929) 279 U. S. 159, 73 L. Ed. 652, 49 S. Ct. 282.

¹² *Waite v. Macy* (1918) 246 U. S. 606, 62 L. Ed. 892, 38 S. Ct. 395.

¹³ *United States v. Illinois Cent. R. Co.* (1934) 291 U. S. 457, 78 L. Ed. 909, 54 S. Ct. 471. See also § 195.

statutory administrative remedy by petition to the agency to "rescind, alter or amend" the order for the reasons stated, had not been sought.¹⁴ An administrative order or regulation of general application may not be judicially assailed where an available administrative remedy of petition for modification as to the particular complaining party has not been exhausted,¹⁵ although such a petition is to be addressed to the very agency which promulgated the original general order or regulation.¹⁶ Where an order, otherwise valid and practicable of application over a wide territory, may be uncertain in isolated instances, the appropriate remedy is to apply to the agency to suspend the operation of its order so far as it may affect the isolated cases, and, if necessary, to enter an independent order dealing specifically with them. A court will not set aside an order merely because of possible uncertainty in isolated cases.¹⁷ Where suit is brought to enjoin or set aside a tax assessment and lien as discriminatory¹⁸ the court will not listen to an objection that the charge has been laid in an arbitrary manner when an administrative remedy for the correction of defects or inequalities has been given by the statute and ignored by the objector.¹⁹ A utility may not sue to enjoin enforcement of an administrative order to maintain service where an administrative remedy of petition for discontinuance of the service, upon an appropriate showing, has not been pursued;²⁰ unless by consent to a full hearing on the issue the

¹⁴ *Natural Gas Pipeline Co. v. Slatery* (1937) 302 U. S. 300, 82 L. Ed. 276, 58 S. Ct. 199.

¹⁵ *Interstate Commerce Commission*.

Birmingham Slag Co. v. United States (D. C. N. D. Ala., S. Div., 1935) 11 F. Supp. 486. See *Algoma Coal & Coke Co. v. United States* (D. C. E. D. Va. 1935) 11 F. Supp. 487.

State Agencies.

Hegeman Farms Corp. v. Baldwin (1934) 293 U. S. 163, 79 L. Ed. 259, 55 S. Ct. 7; *P. F. Petersen Baking Co. v. Bryan* (1934) 290 U. S. 570, 78 L. Ed. 505, 54 S. Ct. 277, 90 A. L. R. 1285; *Georgia Public Service Commission v. United States* (1931) 283 U. S. 765, 75 L. Ed. 1397, 51 S. Ct. 619. See *Red "C" Oil Mfg. Co. v. Board of Agriculture* (1912) 222 U. S. 380, 56 L. Ed. 240, 32 S. Ct. 152; *Sunray*

Oil Co. v. Thompson (D. C. N. D. Tex. 1936) 13 F. Supp. 867.

¹⁶ *P. F. Petersen Baking Co. v. Bryan* (1934) 290 U. S. 570, 78 L. Ed. 505, 54 S. Ct. 277, 90 A. L. R. 1285; *Sunray Oil Co. v. Thompson* (D. C. N. D. Tex. 1936) 13 F. Supp. 867.

¹⁷ *Georgia Public Service Commission v. United States* (1931) 283 U. S. 765, 75 L. Ed. 1397, 51 S. Ct. 619.

¹⁸ See § 401 et seq.

¹⁹ *Utley v. St. Petersburg* (1934) 292 U. S. 106, 78 L. Ed. 1155, 54 S. Ct. 593, rehearing denied 292 U. S. 604, 78 L. Ed. 1466, 54 S. Ct. 712.

²⁰ *St. Louis-San Francisco R. Co. v. Alabama Public Service Commission* (1929) 279 U. S. 560, 73 L. Ed. 843, 49 S. Ct. 383; *Western & A. R. Co. v. Georgia Public Service Commission* (1925) 267 U. S. 493, 69 L. Ed. 753, 45 S. Ct. 409.

agency waives the defect.²¹ The administrative remedy of petition for permission to abandon should be especially pursued where no constitutional right would have been infringed by so doing, no emergency existed requiring immediate action, and no serious financial loss would have been incurred by the slight delay involved.²² But the past failure of the railway to apply for leave does not justify exposing it, its officers, and employees to severe statutory penalties.²³ The Commission should give the railway the opportunity of presenting the facts; and if application is made promptly, should determine the matter without subjecting the railway to any prejudice because of its failure to ask leave before discontinuing the service. In such case the Supreme Court will vacate a decree denying an interlocutory injunction, and continue a restraining order. If, after hearing upon an application to abandon, the Commission insists service be restored, further proceedings appropriate to the situation may be had in the cause in the district court.²⁴

§ 229. Converse Situation: Rule Applies.

Just as administrative action cannot be judicially assailed while appropriate administrative remedies, which are legislative in character, remain for overcoming the objection, so a suit based upon an administrative order may not prevail while remaining administrative remedies invoked by the opposing party are in the process of exhaustion.²⁵ Thus a plaintiff cannot recover in an action at law based upon an order, where an adequate and timely application by the defendant for relief from the operation of the order is still pending before the agency which made the order.²⁶

§ 230. Rule Stricter Respecting State Administrative Remedies.

Aside from questions of exhaustion of administrative remedies, the federal courts exercise caution and reluctance in respect of local controversies between state and federal courts, especially when asked

²¹ *Western & A. R. Co. v. Georgia Public Service Commission* (1925) 267 U. S. 493, 69 L. Ed. 753, 45 S. Ct. 409.

²² *St. Louis-San Francisco R. Co. v. Alabama Public Service Commission* (1929) 279 U. S. 560, 73 L. Ed. 843, 49 S. Ct. 383.

²³ See § 49.

²⁴ *St. Louis-San Francisco R. Co. v. Alabama Public Service Commission*

(1929) 279 U. S. 560, 73 L. Ed. 843, 49 S. Ct. 383. See also § 800.

²⁵ *Patterson v. Louisville & N. R. Co.* (1925) 269 U. S. 1, 70 L. Ed. 131, 46 S. Ct. 8.

²⁶ *Patterson v. Louisville & N. R. Co.* (1925) 269 U. S. 1, 70 L. Ed. 131, 46 S. Ct. 8.

to interfere by injunction with the activities of state officers discharging in good faith their supposed official duties.²⁷ Comity generally requires that the federal power to interfere with state administrative agencies should be exercised with the greatest caution and reluctance where a state administrative remedy is available;²⁸ and the rule requiring the exhaustion of available, appropriate administrative remedies has special force where resort is had to the federal courts to restrain action of state officers.²⁹ This principle applies when a further state legislative remedy is available even though it is not exercisable by a purely administrative body, as when an available legislative remedy is exercised through administrative powers conferred on state courts.³⁰

²⁷ *Hawks v. Hamill* (1933) 288 U. S. 52, 77 L. Ed. 610, 53 S. Ct. 240; *Lawrence v. St. Louis-San Francisco R. Co.* (1927) 274 U. S. 588, 71 L. Ed. 1219, 47 S. Ct. 720.

²⁸ *First Nat. Bank v. Weld County* (1924) 264 U. S. 450, 68 L. Ed. 784, 44 S. Ct. 385; *Board of Directors of St. Francis Levee Dist. v. St. Louis-San Francisco R. Co.* (C. C. A. 8th, 1934) 74 F. (2d) 183.

²⁹ * *Natural Gas Pipeline Co. v. Slattery* (1937) 302 U. S. 300, 82 L. Ed. 276, 58 S. Ct. 199; *P. F. Petersen Baking Co. v. Bryan* (1934) 290 U. S. 570, 78 L. Ed. 505, 54 S. Ct. 277, 90 A. L. R. 1285; *Gorham Mfg. Co. v. State Tax Commission* (1924) 266 U. S. 265, 69 L. Ed. 279, 45 S. Ct. 80; *City of El Paso v. Texas Cities Gas Co.* (C. C. A. 5th, 1938) 100 F. (2d) 501, cert. den. 306 U. S. 650, 83 L. Ed. 1049, 59 S. Ct. 592.

³⁰ *Lane v. Wilson* (1939) 307 U. S. 268, 83 L. Ed. 1281, 59 S. Ct. 872; *Porter v. Investors Syndicate* (1932) 286 U. S. 461, 76 L. Ed. 1226, 52 S. Ct. 617; *Home Telephone & Telegraph Co. v. Kuykendall* (1924) 265 U. S. 206, 68 L. Ed. 982, 44 S. Ct. 557; *Pacific Telephone & Telegraph Co. v. Kuykendall* (1924) 265 U. S. 196, 68 L. Ed. 975, 44 S. Ct. 553; *Public*

Service Co. v. Corboy (1919) 250 U. S. 153, 63 L. Ed. 905, 39 S. Ct. 440; *Louisville & N. R. Co. v. Garrett* (1913) 231 U. S. 298, 58 L. Ed. 229, 34 S. Ct. 48; *Kansas City Southern R. Co. v. Cornish* (C. C. A. 10th, 1933) 65 F. (2d) 671. See *Oklahoma Natural Gas Co. v. Russell* (1923) 261 U. S. 290, 67 L. Ed. 659, 43 S. Ct. 353. See also § 45 et seq.

"The State of Virginia has endeavored to impose the highest safeguards possible upon the exercise of the great power given to the State Corporation Commission, not only by the character of the members of that commission, but by making its decisions dependent upon the assent of the same historic body that is entrusted with the preservation of the most valued constitutional rights, if the railroads see fit to appeal. It seems to us only a just recognition of the solicitude with which their rights have been guarded, that they should make sure that the State in its final legislative action would not respect what they think their rights to be, before resorting to the courts of the United States." (Mr. Justice Holmes in *Prentis v. Atlantic Coast Line Co.* (1908) 211 U. S. 210, 230, 53 L. Ed. 150, 29 S. Ct. 67.)

But where the Supreme Court of a state decides a suit by a shipper to enforce a state commission order against a carrier on the merits, without mentioning the question, a contention, first made by the plaintiff in the Supreme Court, that the defendant failed to exhaust a state administrative remedy allowing attack on the order will be rejected. The Supreme Court must assume that the state court considered all that was pertinent, and regarded all else untenable, including this contention.³¹

§ 231. Rule Inapplicable to State Judicial Remedies.

The rule requiring exhaustion of administrative remedies, while applicable to legislative review by state courts, does not extend to include state judicial remedies. Accordingly exhaustion of a state³² or territorial³³ judicial remedy is not a prerequisite to appropriate judicial relief in a federal court, unless there are exceptional circumstances,³⁴ or explicit statutory requirements such as the Johnson Act.³⁵

§ 232. — When There Is Doubt as to Whether State Remedy Is Legislative or Judicial.

A remedy of "appeal" from an administrative agency to a state court will ordinarily be regarded as judicial in the absence of affirm-

³¹ *Vandalia R. Co. v. Schnull* (1921) 255 U. S. 113, 65 L. Ed. 539, 41 S. Ct. 324.

³² *Lane v. Wilson* (1939) 307 U. S. 268, 83 L. Ed. 1281, 59 S. Ct. 872; *State Corporation Commission v. Wichita Gas Co.* (1934) 290 U. S. 561, 78 L. Ed. 500, 54 S. Ct. 321; *Railroad & Warehouse Commission of Minn. v. Duluth St. R. Co.* (1927) 273 U. S. 625, 71 L. Ed. 793, 47 S. Ct. 531; *Bohler v. Callaway* (1925) 267 U. S. 479, 69 L. Ed. 745, 45 S. Ct. 431; *Home Telephone & Telegraph Co. v. Kuykendall* (1924) 265 U. S. 206, 68 L. Ed. 982, 44 S. Ct. 557; *Pacific Telephone & Telegraph Co. v. Kuykendall* (1924) 265 U. S. 196, 68 L. Ed. 975, 44 S. Ct. 553; **Bacon v. Rutland R. Co.* (1914) 232 U. S. 134, 58 L. Ed. 538, 34 S. Ct. 283; *Kansas City Southern R. Co. v. Cornish* (C. C. A. 10th, 1933) 65 F. (2d) 671; *Columbia Ry. Gas & Electric Co. v. Blease* (D. C. E. D. S. Car. 1927) 42 F. (2d) 463;

* *Central Kentucky Natural Gas Co. v. Railroad Commission of Ky.* (D. C. E. D. Ky. 1930) 37 F. (2d) 938; *Los Angeles Ry. Corp. v. Railroad Commission of Calif.* (1928) 29 F. (2d) 140, aff'd 280 U. S. 145, 74 L. Ed. 234, 50 S. Ct. 71; *Union Light Heat & Power Co. v. Railroad Commission of Ky.* (D. C. E. D. Ky. 1926) 17 F. (2d) 143; *Texport Carrier Corp. v. Smith* (D. C. S. D. Tex., Austin Div., 1934) 8 F. Supp. 28; *Albee Godfrey Whale Creek Co. v. Perkins* (D. C. S. D. N. Y. 1933) 6 F. Supp. 409; *Rosslyn Gas Co. v. Fletcher* (D. C. E. D. Va. 1933) 5 F. Supp. 25.

³³ *Munoz v. Porto Rico Ry., Light & Power Co.* (C. C. A. 1st, 1934) 74 F. (2d) 816, cert. den. 296 U. S. 577, 80 L. Ed. 408, 56 S. Ct. 88.

³⁴ *Lane v. Wilson* (1939) 307 U. S. 268, 83 L. Ed. 1281, 59 S. Ct. 872.

³⁵ 28 USCA 41(1). *Lane v. Wilson* (1939) 307 U. S. 268, 83 L. Ed. 1281, 59 S. Ct. 872. See also § 671.

ative indications that it is administrative or legislative.³⁶ Whether a state remedy is legislative or judicial is a judicial question, on which the decision of the state's highest court is binding on the federal courts.³⁷

Where constitutional rights are insisted on it is unjust to put the plaintiff to the chances of possibly reaching the desired result by an appeal to the state court, when at least it is possible that he would find himself too late if he afterward went to a federal district court.³⁸ If the plaintiff prefers to entrust the final decision to the courts of the United States rather than to those of the state he has the right to do so.³⁹ Thus, where, under state law, appeal from a Commission order is to a state court, which appeal has been held to be judicial review by the state Supreme Court, this remedy need not be exhausted. If the order is affirmed the matter will become *res judicata* and resort to the federal court will be too late.⁴⁰ In such a case it would be unjust to require exhaustion of the remedy because it might be said that the Supreme Court would exercise its own judgment as to how the proceedings in the state court should be characterized and not impossibly regard them as legislative,⁴¹ or because it might be said that however characterized the judgment does not operate as such, but is taken up into the subsequent order of the Commission and therefore is subject to review after it has been given that form.⁴²

§ 233. When Rule Does Not Apply.

The rule requiring exhaustion of administrative remedies does not apply where a prescribed administrative remedy fails to comply with the requirements of procedural due process, for resort to such a remedy would be impractical and futile.⁴³ Thus, where the "remedy" pro-

³⁶ Goldsmith v. Standard Chemical Co. (C. C. A. 8th, 1927) 23 F. (2d) 313, cert. den. 277 U. S. 599, 72 L. Ed. 1008, 48 S. Ct. 560.

³⁷ Kansas City Southern R. Co. v. Cornish (C. C. A. 10th, 1933) 65 F. (2d) 671.

³⁸ Railroad & Warehouse Commission of Minn. v. Duluth St. R. Co. (1927) 273 U. S. 625, 71 L. Ed. 793, 47 S. Ct. 531.

³⁹ Railroad & Warehouse Commission of Minn. v. Duluth St. R. Co. (1927) 273 U. S. 625, 71 L. Ed. 793, 47 S. Ct. 531.

⁴⁰ Railroad & Warehouse Commis-

sion of Minn. v. Duluth St. R. Co. (1927) 273 U. S. 625, 71 L. Ed. 793, 47 S. Ct. 531.

⁴¹ Railroad & Warehouse Commission of Minn. v. Duluth St. R. Co. (1927) 273 U. S. 625, 71 L. Ed. 793, 47 S. Ct. 531.

⁴² Railroad & Warehouse Commission of Minn. v. Duluth St. R. Co. (1927) 273 U. S. 625, 71 L. Ed. 793, 47 S. Ct. 531.

⁴³ Utley v. St. Petersburg (1934) 292 U. S. 106, 78 L. Ed. 1155, 54 S. Ct. 593, rehearing denied 292 U. S. 604, 78 L. Ed. 1466, 54 S. Ct. 712; Munn v. Des Moines Nat. Bank (C. C.

vided does not contemplate a hearing, it cannot be regarded as one which needs to be exhausted as a prerequisite to judicial review.⁴⁴ It also does not apply where possible remaining steps of procedure do not constitute an administrative remedy.⁴⁵ Thus, where a statute imposing a license tax on retailers of tobacco provided for confiscation of articles to which stamps were not affixed, with the right to give a bond so that unstamped articles might be held pending forfeiture proceeding, the provision for a bond was held not an administrative remedy within the rule requiring prerequisite exhaustion of such remedies.⁴⁶ And the rule does not necessarily apply where a further administrative remedy consists of the right to petition for a rehearing, which does not act as a stay of administrative action previously taken. A court has jurisdiction, in an appropriate case, to entertain a suit to enjoin or set aside an order despite the failure to apply for a rehearing in such a case, but whether it grants or denies relief until all possible administrative remedies have been exhausted is a matter for the exercise of the court's discretion.⁴⁷ This illustrates the difference between the primary jurisdiction doctrine and the rule requiring exhaustion of administrative remedies. Although a reviewing court may have jurisdiction due to compliance with the primary jurisdiction doctrine, equitable relief may be denied because all administrative remedies have not been exhausted.⁴⁸

An administrative remedy attendant upon an administrative order which does not affect the complainant's legal rights and so is not judicially reviewable by him,⁴⁹ need not then be exhausted in order to review an order of definitive character eventually made relating thereto.⁵⁰ Thus where, in a former proceeding before a state commission, no order was made which infringed rights or could have been brought before the Supreme Court, there is no necessity to have appealed this order, as permitted by state procedure, in order to review

A. 8th, 1927) 18 F. (2d) 269; *Kansas City Southern R. Co. v. Ogden Levee Dist.* (C. C. A. 8th, 1926) 15 F. (2d) 637. See *P. F. Petersen Baking Co. v. Bryan* (1934) 290 U. S. 570, 78 L. Ed. 505, 54 S. Ct. 277, 90 A. L. R. 1285; *Porter v. Investors Syndicate* (1932) 287 U. S. 346, 77 L. Ed. 354, 53 S. Ct. 132.

⁴⁴ *Kansas City Southern R. Co. v. Ogden Levee Dist.* (C. C. A. 8th, 1926) 15 F. (2d) 637.

⁴⁵ *Butler v. D. A. Schulte, Inc.* (C. C. A. 5th, 1933) 67 F. (2d) 632.

⁴⁶ *Butler v. D. A. Schulte, Inc.* (C. C. A. 5th, 1933) 67 F. (2d) 632.

⁴⁷ *United States v. Abilene & S. R. Co.* (1924) 265 U. S. 274, 68 L. Ed. 1016, 44 S. Ct. 565. See also § 243 et seq.

⁴⁸ *United States v. Abilene & S. R. Co.* (1924) 265 U. S. 274, 68 L. Ed. 1016, 44 S. Ct. 565.

⁴⁹ See § 187 et seq.

⁵⁰ *New York Cent. R. Co. v. New York & Pennsylvania Co.* (1926) 271 U. S. 124, 70 L. Ed. 865, 46 S. Ct. 447.

in the Supreme Court a later order which does infringe rights. When the latter order is made, this is the first moment when the party aggrieved has a chance to raise a perfectly clear point, as it is the first moment when his rights are infringed. It would not be reasonable to hold that he is precluded from getting the protection that the Supreme Court owes him, by failing to go as far as he now learns he might have gone in a previous state proceeding which did not infringe his rights and could not be brought to the Supreme Court.⁵¹ For instance, an order of a state Commission holding a rate reasonable, and stating that upon presentation of a petition accompanied by the supporting data, reparation will be awarded for changes in excess of these rates, does not infringe the rights of a carrier operating in the state. A failure to appeal it does not preclude the Supreme Court from passing on a later reparation order.⁵² Whether federal rights asserted are lost by such failure to appeal is open to examination in the Supreme Court.⁵³

Nor is exhaustion of an administrative remedy necessary where at the time it could have been availed of the state decisions ruled that the remedy was not administrative.⁵⁴

§ 234. State Agencies: Relaxation of Rule: Constitutional Rights.

The requirement that state remedies be exhausted is not a fundamental principle of substantive law, but merely a requirement of convenience or comity.⁵⁵ It therefore must give way to a valid claim of constitutional right.⁵⁶ For instance, in *Prentis v. Atlantic Coast*

⁵¹ *New York Cent. R. Co. v. New York & Pennsylvania Co.* (1926) 271 U. S. 124, 70 L. Ed. 865, 46 S. Ct. 447.

⁵² *New York Cent. R. Co. v. New York & Pennsylvania Co.* (1926) 271 U. S. 124, 70 L. Ed. 865, 46 S. Ct. 447.

⁵³ *New York Cent. R. Co. v. New York & Pennsylvania Co.* (1926) 271 U. S. 124, 70 L. Ed. 865, 46 S. Ct. 447.

⁵⁴ *Brinkerhoff-Faris Trust & Savings Co. v. Hill* (1930) 281 U. S. 673, 74 L. Ed. 1107, 50 S. Ct. 451.

⁵⁵ *Lane v. Wilson* (1939) 307 U. S. 268, 83 L. Ed. 1281, 59 S. Ct. 872; *Railroad & Warehouse Commission of Minn. v. Duluth St. R. Co.* (1927) 273 U. S. 625, 71 L. Ed. 793, 47 S. Ct.

531; *Home Telephone & Telegraph Co. v. Kuykendall* (1924) 265 U. S. 206, 68 L. Ed. 982, 44 S. Ct. 557; *Pacific Telephone & Telegraph Co. v. Kuykendall* (1924) 265 U. S. 196, 68 L. Ed. 975, 44 S. Ct. 553; *El Paso v. Texas Cities Gas Co.* (C. C. A. 5th, 1938) 100 F. (2d) 501, cert. den. 306 U. S. 650, 83 L. Ed. 1049, 59 S. Ct. 592.

⁵⁶ *Home Telephone & Telegraph Co. v. Kuykendall* (1924) 265 U. S. 206, 68 L. Ed. 982, 44 S. Ct. 557; *Pacific Telephone & Telegraph Co. v. Kuykendall* (1924) 265 U. S. 196, 68 L. Ed. 975, 44 S. Ct. 553; *Oklahoma Natural Gas Co. v. Russell* (1923) 261 U. S. 290, 67 L. Ed. 659, 43 S. Ct. 353.

Line Co.,⁵⁷ there was no doubt as to the jurisdiction of the federal court, but simply a decision that the bills should be retained to await the result of state administrative appeals, if the plaintiffs saw fit to take them.⁵⁸ The plaintiffs had made no effort to secure a revision and there had been no present invasion of their rights, but only the taking of preliminary steps toward cutting them down. In such circumstances it was thought to be more reasonable and proper to await further action on the part of the state.⁵⁹ But where a utility is shown by the averments of its bill to be suffering daily from confiscation under the rates to which it is limited, and the state statute forbids a stay pending administrative appeal, comity yields to constitutional right, and the fact that administrative appeal is not exhausted will not prevent the federal court from suspending the daily confiscation, if it finds the case to justify it. The utility may rely on the presumption of validity of the state statute; it need not establish that it is not invalid under the State Constitution.⁶⁰

The rule is the same where the averments are the same and there is legislative review in the state Supreme Court, and an appeal is taken thereto, but the court refuses a supersedeas in the meantime. The plaintiffs have done all they can under the state law to get relief, and cannot. Even if the state court later changes the rate, *nunc pro tunc*, they will have no adequate remedy for what they may have lost before the court shall have acted. The federal court has jurisdiction, and a duty to try the question whether injunctions should issue.⁶¹

⁵⁷ (1908) 211 U. S. 210, 53 L. Ed. 150, 29 S. Ct. 67.

⁵⁸ *Prentiss v. Atlantic Coast Line Co.* (1908) 211 U. S. 210, 53 L. Ed. 150, 29 S. Ct. 67.

⁵⁹ *Oklahoma Natural Gas Co. v. Russell* (1923) 261 U. S. 290, 67 L. Ed. 659, 43 S. Ct. 353.

⁶⁰ *Pacific Telephone & Telegraph Co. v. Kuykendall* (1924) 265 U. S. 196, 68 L. Ed. 975, 44 S. Ct. 553; *Home Telephone & Telegraph Co. v. Kuykendall* (1924) 265 U. S. 206, 68 L. Ed. 982, 44 S. Ct. 557.

⁶¹ *Oklahoma Natural Gas Co. v. Russell* (1923) 261 U. S. 290, 67 L. Ed. 659, 43 S. Ct. 353. See also § 49.

"Where as ancillary to the review and correction of administrative action, the state statute provides that

the complaining party may have a stay until final decision, there is no deprivation of due process, although the statute in words attributes final and binding character to the initial decision of a board or commissioner. *Pacific Live Stock Co. v. Lewis*, 241 U. S. 440, 454. But where either the plain provisions of the statute (*Pacific Tel. Co. v. Kuykendall*, 265 U. S. 196, 203, 204) or the decisions of the state courts interpreting the act (*Oklahoma Nat. Gas Co. v. Russell*, 261 U. S. 290) preclude a supersedeas or stay until the legislative process is completed by the final action of the reviewing court, due process is not afforded, and in cases where the other requisites of federal jurisdiction exist recourse to a federal court

The rule requiring exhaustion of state administrative remedies may be relaxed where an administrative order is assailed in its entirety, but this rests in the sound discretion of the trial court.⁶² The rule may be relaxed to do equity. For instance a federal court of equity may, upon a claim for a refund by shippers, based on lower rates ordered by a state agency, consider the confiscatory character of those rates, although state administrative remedies have not been exhausted, where the carrier collected the higher rates under color of legal right—an Interstate Commerce Commission order.⁶³ If the rates are confiscatory, the court may remain inactive so as to do equity, irrespective of legal rights and remedies.⁶⁴

A cogent reason for refusing to relax the rule exists where the particular method by which the agency has chosen to exercise its authority, a matter peculiarly within its competence, is under attack, and there is the possibility of removal of these issues from the case by modification of the order, all such issues being entirely within administrative authority.⁶⁵

§ 235. Summary: State Remedies Which Bar Federal Judicial Review.

Where an order of a state administrative agency is involved, there are four types of available state remedies which constitute a bar to the bringing of a suit to enjoin the order in a federal equity district court, (1) an appropriate state administrative remedy,⁶⁶ (2) an adequate remedy at law,⁶⁷ (3) any state judicial remedy where there are exceptional circumstances,⁶⁸ and (4) a state remedy which invokes the prohibition of the Johnson Act.⁶⁹

§ 236. Converse of Rule: Injunction Against Pursuit of Administrative Remedies.

A party may be enjoined from pursuing an administrative remedy before a state agency where the relief there sought is not legally

of equity is justified." (Mr. Justice Roberts in *Porter v. Investors Syndicate* (1932) 286 U. S. 461, 470, 471, 76 L. Ed. 1226, 52 S. Ct. 617.)

⁶² * *Natural Gas Pipeline Co. v. Slattery* (1937) 302 U. S. 300, 82 L. Ed. 276, 58 S. Ct. 199.

⁶³ *Atlantic Coast Line R. Co. v. Florida* (1935) 295 U. S. 301, 79 L. Ed. 1451, 55 S. Ct. 713, rehearing denied 295 U. S. 769, 79 L. Ed. 1710, 55 S. Ct. 911.

⁶⁴ *Atlantic Coast Line R. Co. v. Florida* (1935) 295 U. S. 301, 79 L. Ed. 1451, 55 S. Ct. 713, rehearing denied 295 U. S. 769, 79 L. Ed. 1710, 55 S. Ct. 911.

⁶⁵ *Natural Gas Pipeline Co. v. Slattery* (1937) 302 U. S. 300, 82 L. Ed. 276, 58 S. Ct. 199.

⁶⁶ See § 227 ante et seq.

⁶⁷ See § 668 et seq.

⁶⁸ See § 231.

⁶⁹ 28 USCA 41 (1). See also § 671.

obtainable until a federal agency has acted on a subject within the power of Congress.⁷⁰ Thus an injunction will lie to enjoin an interstate railroad from building an extension of its line and from prosecuting a petition to a state agency for permission to build it, before obtaining a certificate of convenience and necessity therefor from the Interstate Commerce Commission.⁷¹

II. RESPECTING JUDICIAL QUESTIONS

§ 237. Introduction.

The subject of exhausting administrative remedies respecting judicial questions may be covered by the question as to whether constitutional and simple judicial questions must be specifically raised in the administrative proceedings. This is one of the least clarified aspects of administrative law, but it would appear to depend upon whether the party raising them is the complaining or defending party to the administrative proceedings. If he is the complainant, he must raise them appropriately if he is to afford the respondent the opportunity to know and meet opposing claims and thus comply with the requirements of procedural due process.⁷² On the other hand, if he is the defending party it is difficult or impossible to forecast what judicial questions in addition to those raised by the complaining party, will be raised by the ensuing administrative action. Accordingly, as a general rule, in an administrative proceeding a complaining party must raise all judicial questions or theories upon which he intends to rely, and, in the absence of statutory provisions, a defending party need not do so.

A. *By Complaining Party*

§ 238. In General.

A complaining party in an administrative proceeding must there raise appropriately all judicial questions and theories upon which he intends to rely either in the administrative proceedings or upon judicial review. The respondent or defending party is always entitled to know with fair certainty the basis of the claim against him.⁷³ Otherwise he may be denied the opportunity to know and meet oppos-

⁷⁰ *Missouri Pac. R. Co. v. Chicago*, 41 F. (2d) 188, cert. den. 282 U. S. R. I. & P. R. Co. (C. C. A. 8th, 1930) 866, 75 L. Ed. 765, 51 S. Ct. 74.

41 F. (2d) 188, cert. den. 282 U. S. ⁷² See § 290 et seq.

866, 75 L. Ed. 765, 51 S. Ct. 74.

⁷¹ *Missouri Pac. R. Co. v. Chicago*, *Co. v. Helvering* (1935) 296 U. S. 200, R. I. & P. R. Co. (C. C. A. 8th, 1930) 80 L. Ed. 154, 56 S. Ct. 185.

ing claims and the constitutional requisites of procedural due process.⁷⁴ Thus where the government urged a judicial ground before a Circuit Court of Appeals which it had not urged before the Board of Tax Appeals, it was held that the Court of Appeals improperly considered the ground and its judgment was reversed, on the theory that a taxpayer is entitled to know with fair certainty the basis of the claim against him. Evidence and stipulations of fact are accommodated only to issues adequately raised.⁷⁵

B. By Defending Party

§ 239. In General: Statutory Requirement.

The primary jurisdiction doctrine, being applicable to judicial questions,⁷⁶ requires that specific judicial questions committed expressly or by implication to an administrative agency for initial decision, be decided in the first instance by that agency. Specific legal theories in connection therewith are ordinarily advanced by the complaining party to the administrative proceeding, and met by the defending party. Above all, however, the question is judicial, on which a binding decision may only be made by an appropriate court acting judicially, and in the absence of statutory provisions the defending party may later advance on judicial review legal theories which he did not advance in the administrative proceedings. All questions as to the power and right of the agency to take certain action are judicial questions, which may be raised, for the first time if necessary, on judicial review. Where a plaintiff contends that an agency has exceeded its statutory powers and that hence the order is void, the courts have jurisdiction of suits to enjoin enforcement of an order, even if plaintiff has not attempted to secure redress in a proceeding before the agency.⁷⁷

Certain statutory provisions for judicial review contain a condition to the effect that "no objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission."⁷⁸ Such a provision may be taken to require that a legal argument be urged before the agency, by rehearing if necessary, before it may be urged in court. This is not to imply that

⁷⁴ See § 290 et seq.

⁷⁵ *General Utilities & Operating Co. v. Helvering* (1935) 296 U. S. 200, 80 L. Ed. 154, 56 S. Ct. 185.

⁷⁶ See § 219 et seq.

⁷⁷ *Skinner & Eddy Corp. v. United States* (1919) 249 U. S. 557, 63 L. Ed. 772, 39 S. Ct. 375.

⁷⁸ See, for example, the Securities Act of 1933, 15 USCA 77i.

a rehearing is necessary if the point, or its substance, has already been urged to the agency.⁷⁹

Likewise where a statute⁸⁰ provides an interim judicial remedy for administrative denial of procedural due process, such as improper refusal to receive evidence, by application to a Circuit Court of Appeals during the administrative proceedings for an order compelling the reception, a failure to avail himself of the remedy prevents a party from later objecting to the denial of due process in the reviewing court on that ground.⁸¹

§ 240. Constitutional Questions.

Constitutional questions can ordinarily be decided only by view of the consequences of an agency's action in their totality, that is, according to the cumulative legal effect of an agency's findings and order after conclusion of administrative proceedings. A party to an administrative proceeding cannot foresee that it or the resulting administrative determination will result in a denial of a constitutional right.⁸² He is in no sense bound, in advance of the agency's findings and report, to set up a fear of transgression of his constitutional rights. Presumably the agency will keep within the law.⁸³

In a confiscation case, the fact that a party offered no evidence as to water rights before the agency does not preclude its complaining to the court that nothing was allowed for them. Moreover, where the agency contends that the party is entitled to no compensation for the rights, to offer evidence would be an idle form.⁸⁴ Where the statute does not require it, there is no perceptible advantage in requiring a party, who claims that an order violates his constitutional rights, to ask an agency to reconsider a determination just reached by it after a public hearing. Nor need he have appeared before the Commission. He is a party to the order equally whether he sees fit to argue the case to the agency or not, and when he stands upon supposed constitutional

⁷⁹ *Mallory Coal Co. v. National Bituminous Coal Commission* (1938) 69 App. D. C. 166, 99 F. (2d) 399.

⁸⁰ E. g., the National Labor Relations Act, § 10 (e), (f), 29 USCA 160 (e), (f).

⁸¹ *Consolidated Edison Co. v. National Labor Relations Board* (1938) 305 U. S. 197, 83 L. Ed. 126, 59 S. Ct. 206.

⁸² See § 261 et seq.

⁸³ *Baltimore & O. R. Co. v. United States* (1936) 298 U. S. 349, 80 L. Ed. 1209, 56 S. Ct. 797; *San Joaquin & K. R. Canal & Irrigation Co. v. County of Stanislaus* (1914) 233 U. S. 454, 58 L. Ed. 1041, 34 S. Ct. 652. See also § 755.

⁸⁴ *San Joaquin & K. R. Canal & Irrigation Co. v. County of Stanislaus* (1914) 233 U. S. 454, 58 L. Ed. 1041, 34 S. Ct. 652.

rights there is no necessity of raising the point until he gets into court. The suit is not for a revision of details, but for a decree that the order is void as a matter of law.⁸⁵ Thus a defending party need not raise constitutional questions in an administrative proceeding in order to raise them subsequently on judicial review.⁸⁶ Specifically they need not be raised by objections to an examiner's proposed report.⁸⁷

Constitutional rights have nevertheless been asserted in administrative proceedings by answer⁸⁸ and by motion.⁸⁹

§ 241. Estoppel Not Favored.

Where an administrative agency contends on judicial review that a party is estopped to object to unlawful administrative action, the agency must make out a clear and convincing case.⁹⁰ This is especially true where constitutional rights are involved, as the courts will not presume acquiescence in the loss of fundamental rights.⁹¹ A party to

⁸⁵ *Hollis v. Kutz* (1921) 255 U. S. 452, 65 L. Ed. 727, 41 S. Ct. 371.

⁸⁶ *Interstate Commerce Commission*.

Baltimore & O. R. Co. v. United States (1936) 298 U. S. 349, 80 L. Ed. 1209, 56 S. Ct. 797; *Manufacturers R. Co. v. United States* (1918) 246 U. S. 457, 62 L. Ed. 831, 38 S. Ct. 383.

State Agencies.

Hollis v. Kutz (1921) 255 U. S. 452, 65 L. Ed. 727, 41 S. Ct. 371 (District of Columbia agency); *San Joaquin & K. R. Canal & Irrigation Co. v. County of Stanislaus* (1914) 233 U. S. 454, 58 L. Ed. 1041, 34 S. Ct. 652.

⁸⁷ *Baltimore & O. R. Co. v. United States* (1936) 298 U. S. 349, 80 L. Ed. 1209, 56 S. Ct. 797.

⁸⁸ *National Labor Relations Board v. Friedman-Harry Marks Clothing Co.* (1937) 301 U. S. 58, 81 L. Ed. 921, 57 S. Ct. 645, 108 A. L. R. 1352; *National Labor Relations Board v. Fruehauf Trailer Co.* (1937) 301 U. S. 49, 81 L. Ed. 918, 57 S. Ct. 642, 108 A. L. R. 1352.

⁸⁹ *Federal Communications Commission*.

Rochester Telephone Corp. v.

United States (1939) 307 U. S. 125, 83 L. Ed. 1147, 59 S. Ct. 754.

National Labor Relations Board.

Washington, Va. & Md. Coach Co. v. National Labor Relations Board (1937) 301 U. S. 142, 81 L. Ed. 965, 57 S. Ct. 648; *National Labor Relations Board v. Friedman-Harry Marks Clothing Co.* (1937) 301 U. S. 58, 81 L. Ed. 921, 57 S. Ct. 645, 108 A. L. R. 1352; *National Labor Relations Board v. Fruehauf Trailer Co.* (1937) 301 U. S. 49, 81 L. Ed. 918, 57 S. Ct. 642, 108 A. L. R. 1352; *Associated Press v. National Labor Relations Board* (1937) 301 U. S. 103, 81 L. Ed. 953, 57 S. Ct. 650; *National Labor Relations Board v. Mackay Radio & Telegraph Co.* (1938) 304 U. S. 333, 82 L. Ed. 1381, 58 S. Ct. 904.

⁹⁰ *Ohio Bell Telephone Co. v. Public Utilities Commission* (1937) 301 U. S. 292, 81 L. Ed. 1093, 57 S. Ct. 724.

⁹¹ *Ohio Bell Telephone Co. v. Public Utilities Commission* (1937) 301 U. S. 292, 81 L. Ed. 1093, 57 S. Ct. 724.

an administrative proceeding is not estopped to object to unlawful action by the agency merely by consenting to consolidation of an administrative investigation proceeding with an adversary proceeding, where unlawful action is taken in the consolidated proceeding.⁹² In fact, no estoppel is possible where no warning was given as to the action taken which is objected to. Consent being the basis of estoppel, there can be no consent where there is no warning.⁹³ The fact that one was a party to a prior administrative proceeding in which it unsuccessfully contended for a certain judicial construction, and was thus left remediless by administrative action, is not estopped from insisting in the courts on judicial review of a second order for the same judicial construction, even though it did not seek judicial review of the previous order made in the prior administrative proceeding.⁹⁴ Nor is a party precluded from review of an order in the Supreme Court by a failure to appeal under state procedure a prior order which did not infringe his rights and could not be taken to the Supreme Court.⁹⁵

§ 242. Exceptions to Rule.

However, an administrative order of general application may not be assailed in court on the ground that it is uncertain of application in isolated instances, unless this has been pointed out to the agency. The appropriate remedy in such circumstances is to apply to the agency to suspend the operation of the order so far as it may affect the isolated cases, and, if necessary, to enter an independent order dealing specifically with them.⁹⁶ Such a specific order, if appropriate for review, could be dealt with by the court without interfering with the operation of the order as a whole or with the flexible administrative processes by which it may from time to time be modified.⁹⁷

⁹² *Ohio Bell Telephone Co. v. Public Utilities Commission* (1937) 301 U. S. 292, 81 L. Ed. 1093, 57 S. Ct. 724.

⁹³ *Ohio Bell Telephone Co. v. Public Utilities Commission* (1937) 301 U. S. 292, 81 L. Ed. 1093, 57 S. Ct. 724.

⁹⁴ *W. P. Brown & Sons Lumber Co. v. Louisville & N. R. Co.* (1937) 299 U. S. 393, 81 L. Ed. 301, 57 S. Ct. 265.

⁹⁵ *New York Cent. R. Co. v. New York & Pennsylvania Co.* (1926) 271 U. S. 124, 70 L. Ed. 865, 46 S. Ct. 447.

⁹⁶ *Georgia Public Service Commission v. United States* (1931) 283 U. S. 765, 75 L. Ed. 1397, 51 S. Ct. 619.

⁹⁷ *Georgia Public Service Commission v. United States* (1931) 283 U. S. 765, 75 L. Ed. 1397, 51 S. Ct. 619.

III. WHEN ADMINISTRATIVE REMEDIES ARE EXHAUSTED

§ 243. In General: Highest Agency Empowered to Act Must Have Done So.

The criterion for ascertaining when an administrative remedy has been exhausted is whether the highest administrative or other body of legislative character empowered to act on the matter complained of has done so.⁹⁸ The requirement should be regarded as one of substance rather than form, and should neither compel a technical or unnecessary administrative step, nor excuse failure to present a substantial point to an appropriate administrative agency. The real basis of the rule is that the legislative process should be substantially complete before judicial relief is sought.

Administrative remedies have been exhausted when disputed questions are purely legal and nothing of an administrative nature remains to be done.⁹⁹

§ 244. Adequate Steps Must Be Taken.

A secondary question is whether adequate steps have been taken to exhaust an available administrative remedy, assuming that some steps have been taken.

An administrative remedy has been exhausted although a statutory "appeal" to a state court has not been taken where the statute fails to indicate that the appellate tribunal would have acted in an administrative, rather than in a judicial, capacity.¹ Adequate steps are not taken where a hearing is available but no demand therefor is made.² Exhaustion of an administrative remedy contemplates at least a fair attempt to have a hearing and to introduce evidence, where a hearing is available, so that merely appearing and protesting orally before a board of tax assessors, without more, is not enough.³ A mere protest against holding a hearing does not exhaust an administrative remedy.⁴

⁹⁸ *City of El Paso v. Texas Cities Gas Co.* (C. C. A. 5th, 1938) 100 F. (2d) 501, cert. den. 306 U. S. 650, 83 L. Ed. 1049, 59 S. Ct. 592.

⁹⁹ *Gully v. Interstate Natural Gas Co., Inc.* (C. C. A. 5th, 1936) 82 F. (2d) 145.

¹ *Goldsmith v. Standard Chemical Co.* (C. C. A. 8th, 1927) 23 F. (2d) 313, cert. den. 277 U. S. 599, 72 L. Ed. 1008, 48 S. Ct. 560. See also § 231.

² *Goldsmith v. United States Board of Tax Appeals* (1926) 270 U. S. 117, 70 L. Ed. 494, 46 S. Ct. 215.

³ *Board of Directors of St. Francis Levee Dist. v. St. Louis-San Francisco Ry. Co.* (C. C. A. 8th, 1934) 74 F. (2d) 183.

⁴ *Sanco Piece Dye Works, Inc. v. Herrick* (D. C. S. D. N. Y. 1940) 33 F. Supp. 80.

And if there is a right to a new administrative proceeding, adequate steps are not taken by application for rehearing in a proceeding in which the persons affected were interested, but not necessary, parties.⁵

Adequate steps are taken where an appropriate application for administrative relief is made but the agency delays for an unreasonably long time in passing upon it.⁶ But in a suit to enjoin an alleged discriminatory tax assessment the plaintiff may not excuse failure to exhaust an available, appropriate administrative remedy by asserting that if he had proceeded to do so there would have been no determination by the time payment of the taxes fell due.⁷ Where rates fixed by administrative action are claimed to have become confiscatory by reason of changing economic conditions, no further administrative steps need be taken, and a bill to enjoin their enforcement will lie even where an application for administrative relief is also pending.⁸

Adequate steps are taken concerning regulation of rates in intrastate commerce mingled with interstate commerce but not to such an extent as to require exclusive control by the Interstate Commerce Commission, where appropriate action has been taken by the state rate-making agency.⁹

Where an agency refuses to initiate or proceed with an administrative proceeding sought until an illegally imposed condition thereof has been complied with, a party appropriately affected has exhausted his administrative remedy.¹⁰ A bill to enjoin such an order does not seek adjudication of an administrative question, or to restrain the agency from hearing and determining it.¹¹ For instance, where the Secretary of the Interior, erroneously construing a statute, requires a land claimant by order to show that the lands claimed are not mineral in character, before he will proceed with his administrative duty of deciding whether they are "swamp and overflowed lands,"

⁵ *United States v. Merchants & Manufacturers Traffic Ass'n* (1916) 242 U. S. 178, 61 L. Ed. 233, 37 S. Ct. 24.

⁶ *Smith v. Illinois Bell Telephone Co.* (1926) 270 U. S. 587, 70 L. Ed. 747, 46 S. Ct. 408.

⁷ *Kansas City Southern R. Co. v. Cornish* (C. C. A. 10th, 1933) 65 F. (2d) 671.

⁸ *Banton v. Belt Line R. Corp.* (1925) 268 U. S. 413, 69 L. Ed. 1020, 45 S. Ct. 534.

⁹ *Missouri Pac. R. R. Corp. v. Nebraska State Ry. Commission* (C. C. A. 8th, 1933) 65 F. (2d) 557, cert. den. 290 U. S. 656, 78 L. Ed. 568, 54 S. Ct. 72.

¹⁰ *St. Louis-San Francisco Ry. Co. v. Lawrence* (D. C. Okla. 1928) 30 F. (2d) 458, aff'd 278 U. S. 228, 73 L. Ed. 282, 49 S. Ct. 106; *Work v. Louisiana* (1925) 269 U. S. 250, 70 L. Ed. 259, 46 S. Ct. 92.

¹¹ *Work v. Louisiana* (1925) 269 U. S. 250, 70 L. Ed. 259, 46 S. Ct. 92.

the claimant may sue to enjoin the order at once. The objections that the Secretary has not yet exercised his jurisdiction to determine the character of the lands and that the claim is still in the process of administration will not prevail.¹²

In a rate proceeding where the claim will be later advanced that certain rates are confiscatory, with right to trial *de novo*, an administrative remedy may not be exhausted where a reasonably complete disclosure of evidence relied on is not made to the agency.¹³

§ 245. Rehearing.

A rehearing is necessary to exhaust an administrative remedy only in the substantial sense or if required by statute. That is, if the agency has already passed on the specific contentions, the administrative remedy has been exhausted. Thus if the specific points in issue have been squarely passed upon by the appropriate administrative agency without its having overlooked or misapprehended either fact or argument, there is no point in applying for a rehearing. In that event administrative remedies have been exhausted.¹⁴ There is no advantage in requiring a party to file a complaint merely asking an administrative agency to review a decision just reached by it after a public hearing,¹⁵ unless a statute requires that no cause of action shall accrue in any court respecting the administrative order unless an application for a rehearing has been made.¹⁶ For instance, where a railroad applied to a state railroad commission for an amendment to an existing tariff and the amendment was made, but afterward upon a shipper's application the amendment was canceled, the railroad was held to have exhausted its administrative remedies without having

¹² *Work v. Louisiana* (1925) 269 U. S. 250, 70 L. Ed. 259, 46 S. Ct. 92.

¹³ *Western Distributing Co. v. Public Service Commission* (D. C. Kan. 1931) 58 F. (2d) 241, aff'd 285 U. S. 119, 76 L. Ed. 655, 52 S. Ct. 283.

¹⁴ *Banton v. Belt Line R. Corp.* (1925) 268 U. S. 413, 69 L. Ed. 1020, 45 S. Ct. 534; *Prendergast v. New York Telephone Co.* (1923) 262 U. S. 43, 67 L. Ed. 853, 43 S. Ct. 466; *Missouri Pac. R. R. Corp. v. Nebraska State Ry. Commission* (C. C. A. 8th, 1933) 65 F. (2d) 557, cert. den. 290

U. S. 656, 78 L. Ed. 568, 54 S. Ct. 72.

¹⁵ *Hollis v. Kutz* (1921) 255 U. S. 452, 65 L. Ed. 727, 41 S. Ct. 371.

¹⁶ *Federal Power Commission.*

The Federal Power Act, 16 USCA 825f(a), and the Natural Gas Act, 15 USCA 717r.

State Agencies.

Prendergast v. New York Telephone Co. (1923) 262 U. S. 43, 67 L. Ed. 853, 43 S. Ct. 466; *Columbia Ry. Gas & Electric Co. v. Blease* (D. C. E. D. S. Car. 1927) 42 F. (2d) 463.

applied for a rehearing. The matter in issue had already been passed upon by the agency.¹⁷

It is within the discretion of a federal equity court to grant, although it could refuse, relief against the operation of an order made by a Division of the Interstate Commerce Commission, although no application has been made under the statute for a rehearing before the full Commission. The order is operative, and an application for rehearing does not act as a stay. Even though this rehearing resembles an appeal to another administrative tribunal, all possible administrative remedies need not be exhausted.¹⁸ Conversely, an order does not deny due process because it grants immediate relief, subject to later readjustment.¹⁹

An administrative agency should, however, be given an opportunity to correct its errors. Hence to exhaust available administrative remedies an application for rehearing is required respecting contentions not specifically passed upon by the agency,²⁰ and where the agency has overlooked or misapprehended either fact or argument concerning which error is claimed or where newly discovered evidence is material, an application for rehearing should be made, not to supplant, but to supplement judicial review.²¹ The requirement is not arbitrary, but a rule of substance depending on the merits of each case.²² The rule is especially applicable where a judicial review statute provides that no objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the agency.²³

¹⁷ *Missouri Pac. R. R. Corp. v. Nebraska State Ry. Commission* (C. C. A. 8th, 1933) 65 F. (2d) 557, cert. den. 290 U. S. 656, 78 L. Ed. 568, 54 S. Ct. 72.

¹⁸ *United States v. Abilene & S. Ry. Co.* (1924) 265 U. S. 274, 68 L. Ed. 1016, 44 S. Ct. 565.

¹⁹ See § 290 et seq.

²⁰ *Natural Gas Pipeline Co. v. Slattery* (1937) 302 U. S. 300, 82 L. Ed. 276, 58 S. Ct. 199; *Vandalia R. Co. v. Public Service Commission* (1916) 242 U. S. 255, 61 L. Ed. 276, 37 S. Ct. 93; *Pender County v. Garysburg Mfg. Co.* (C. C. A. 4th, 1931) 50 F. (2d) 732; *Board of Public Utility Com'rs of N. J. v. United States* (D. C. N. J., 1937) 21 F. Supp.

543. See *Red River Broadcasting Co. v. Federal Communications Commission* (1938) 69 App. D. C. 1, 98 F. (2d) 282, cert. den. 305 U. S. 625, 83 L. Ed. 400, 59 S. Ct. 86.

²¹ *Southland Industries, Inc. v. Federal Communications Commission* (1938) 69 App. D. C. 82, 99 F. (2d) 117. See *Mallory Coal Co. v. National Bituminous Coal Commission* (1938) 69 App. D. C. 166, 99 F. (2d) 399.

²² *Southland Industries, Inc. v. Federal Communications Commission* (1938) 69 App. D. C. 82, 99 F. (2d) 117.

²³ See *Mallory Coal Co. v. National Bituminous Coal Commission* (1938) 69 App. D. C. 166, 99 F. (2d) 399.

It has been indicated that such a statutory provision may automatically require a rehearing before judicial review may be had as provided,²⁴ but, if the objection to the order urged in court was previously urged as a contention in the administrative proceeding, it would appear to be futile to require the filing of a petition for a rehearing.

A contention that an administrative order, made without a hearing to the party in question, imposes heavy, cumulative penalties upon the party while seeking judicial relief from its allegedly unlawful terms, will not be entertained where the statute provides for an administrative remedy for avoiding imposition of the penalties, in the nature of a rehearing, to "rescind, alter or amend" the order. Under these provisions the agency could postpone the effective date of the order pending application to it for modification of the allegedly unlawful provisions, so as to avoid imposition of the penalties. Equitable relief may not be had to review the allegedly unlawful provisions because of the penalties imposed, where an administrative remedy to avoid the penalties was available, but not first exhausted.²⁵

In order to exhaust administrative remedies where the practice is to accept as sound all findings by an examiner to which exceptions have not been made, a party must apply for a rehearing if desirous of attacking the sufficiency of findings to which it did not except.²⁶

Administrative remedies have not been exhausted so long as an application for a rehearing is pending undetermined,²⁷ or, after such an application has been granted, before the rehearing has been concluded,²⁸ provided no unreasonably long delay by the agency ensues.

²⁴ *Mallory Coal Co. v. National Bituminous Coal Commission* (1938) 69 App. D. C. 166, 99 F. (2d) 399.

²⁵ *Natural Gas Pipeline Co. v. Slattery* (1937) 302 U. S. 300, 82 L. Ed. 276, 58 S. Ct. 199.

²⁶ *Board of Public Utility Com'rs of N. J. v. United States* (D. C. N. J. 1937) 21 F. Supp. 543.

²⁷ *Woodmen of the World Life Ins. Ass'n v. Federal Communications*

Commission (1938) 69 App. D. C. 87, 99 F. (2d) 122; *Southland Industries, Inc. v. Federal Communications Commission* (1938) 69 App. D. C. 82, 99 F. (2d) 117.

²⁸ *Black River Valley Broadcasts, Inc. v. McNinch* (1938) 69 App. D. C. 311, 101 F. (2d) 235, cert. den. 307 U. S. 623, 83 L. Ed. 1501, 59 S. Ct. 793.

PART III

METHODS OF JUDICIAL REVIEW

CHAPTER 17

IN GENERAL

I. METHODS OF INTERLOCUTORY JUDICIAL REVIEW

§ 246. In General.

II. METHODS OF FINAL JUDICIAL REVIEW

§ 247. In General.

§ 248. Judicial Review in Federal Court Cannot Be Obtained by Enjoining Suit in State Court.

I. METHODS OF INTERLOCUTORY JUDICIAL REVIEW

§ 246. In General.

Interlocutory judicial review is review by a court of administrative action taken prior to a final administrative determination on the merits. It may be obtained by a writ of mandamus to compel an agency to perform a ministerial duty¹ such as the taking of jurisdiction clearly required by law which an agency has refused to do,² the reception of legally admissible evidence which the agency has excluded,³ or the making of findings plainly required by the evidence.⁴ It may also be obtained by application to a court for an order to the agency, where there is statutory provision for such procedure.⁵

Where a method of interlocutory judicial review is available, and a party neglects to make use of it, he cannot, upon final judicial review complain of administrative action reviewable by the interlocutory method.⁶ The principal purpose of interlocutory judicial review is

¹ See § 688 et seq.

² See § 695.

³ See § 696.

⁴ See § 697.

⁵ See the statutes set forth in Appendix A, §§ 831-860.

⁶ Consolidated Edison Co. v. National Labor Relations Board (1938) 305 U. S. 197, 83 L. Ed. 126, 59 S. Ct. 206.

to remove procedural defects which might otherwise entirely vitiate a final administrative determination.

II. METHODS OF FINAL JUDICIAL REVIEW

§ 247. In General.

Final judicial review—which is what is ordinarily meant by the phrase “judicial review”—is judicial review of final administrative action which affects a party’s legal rights. It is ordinarily directed against affirmative administrative action.⁷

The procedural mechanics for obtaining final judicial review are varied.⁸ It may be obtained by suit to enforce,⁹ enjoin enforcement of, suspend, annul or set aside,¹⁰ an administrative order; under statutory provisions by “petition” for review,¹¹ or “appeal” to a designated court¹² which is said to be in the nature of a suit to have the order adjudged invalid;¹³ suits to quiet title;¹⁴ suit to restrain a criminal prosecution based upon an administrative order;¹⁵ or in a criminal prosecution for violation of law based upon the validity of an administrative order;¹⁶ suit to compel an agency, by injunction or writ of mandamus, to act in accordance with correct legal principles, that is, the proper decision of judicial questions which have not been

⁷ This is to be contrasted with judicial relief directed against negative administrative action, such as mandamus. See § 688.

⁸ See Nathan Isaacs in “Judicial Review of Administrative Findings,” (1921) 30 Yale L. Jour. 781. See also § 615 et seq.

⁹ Federal Trade Commission v. Balme (C. C. A. 2d, 1928) 23 F. (2d) 615, cert. den. 277 U. S. 598, 72 L. Ed. 1007, 48 S. Ct. 560. See also § 617 et seq.

¹⁰ See § 625.

¹¹ Grain Futures Act, 7 USCA 9. Wallace v. Cutten (1936) 298 U. S. 229, 80 L. Ed. 1157, 56 S. Ct. 753.

¹² Federal Power Commission v. Metropolitan Edison Co. (1938) 304 U. S. 375, 82 L. Ed. 1408, 58 S. Ct. 963; Federal Radio Commission v. Nelson Bros. Bond & Mtg. Co. (1933) 289 U. S. 266, 77 L. Ed. 1166, 53 S. Ct. 627, 89 A. L. R. 406.

¹³ Public Service Commission of Puerto Rico v. Havemeyer (1936) 296 U. S. 506, 80 L. Ed. 357, 56 S. Ct. 360, rehearing denied 297 U. S. 727, 80 L. Ed. 1010, 56 S. Ct. 496.

¹⁴ Borax Consolidated, Ltd. v. Los Angeles (1935) 296 U. S. 10, 80 L. Ed. 9, 56 S. Ct. 23, rehearing denied 296 U. S. 664, 80 L. Ed. 473, 56 S. Ct. 304; Johnson v. Towsley (1871) 13 Wall. (80 U. S.) 72, 20 L. Ed. 485. See Standard Oil Co. of Calif. v. United States (C. C. A. 9th, 1940) 107 F. (2d) 402, cert. den. 309 U. S. 654, 84 L. Ed. 1003, 60 S. Ct. 469, rehearing denied 309 U. S. 697, 80 L. Ed. 1036, 60 S. Ct. 708.

¹⁵ See § 686.

¹⁶ United States v. Michigan Portland Cement Co. (1926) 270 U. S. 521, 70 L. Ed. 713, 46 S. Ct. 395; Monongahela Bridge Co. v. United States (1910) 216 U. S. 177, 54 L. Ed. 435, 30 S. Ct. 356.

committed for exclusive administrative decision in the first instance;¹⁷ or petition for a writ of habeas corpus.¹⁸ Writs of certiorari and prohibition, while putative remedies, have apparently never been issued in the federal courts to administrative agencies.¹⁹ Judicial review may also be secured by suit to enjoin interference with obedience to an administrative order, or in an action at law for money damages.^{19a} The procedural method used, the form of action, is not important so far as the character and scope of judicial review is concerned. In particular, suits to enforce administrative orders, and suits to enjoin, annul or set them aside, are governed by identical rules respecting the scope of review, and the jurisdiction of the reviewing court is of the same character and scope.²⁰ The validity of an administrative determination, regulation or sanction may be determined whenever such question is in issue, in the absence of statutory provisions to the contrary, and thus any such suit involves judicial review.

Suits or petitions to enforce administrative orders may be brought only under appropriate statutory authority.²¹ Suits to enjoin, annul, or set aside an order of a federal administrative agency may be brought under appropriate statutory provisions, such as the Urgent Deficiencies Act,²² or under the general equity power of the federal district courts, composed either of one judge,²³ or of three judges.²⁴ Suits to enjoin, annul or set aside an order of a state administrative agency may be brought under the equity jurisdiction of either a one or three judge federal district court.²⁵ Suits to enjoin, annul, or set aside orders of a local unit within a state, which is not state action, may be brought only under the general equity power of a one judge federal district court.²⁶

Where statutory provision for judicial relief from confiscatory administrative action exists, a company cannot obtain relief therefrom in a suit brought by a customer to enjoin the enforcement of rates set

¹⁷ See § 687 et seq.

¹⁸ See § 708.

¹⁹ See *Degge v. Hitchcock* (1913)

229 U. S. 162, 57 L. Ed. 1135, 33 S.

Ct. 639. See also §§ 703, 705.

^{19a} See § 826.

²⁰ *Ford Motor Co. v. National Labor Relations Board* (1938) 305

U. S. 364, 83 L. Ed. 221, 59 S. Ct.

301.

²¹ See § 617.

²² See § 633 et seq.

²³ See § 650 et seq.

²⁴ 28 USCA 380a. See also § 672 et seq.

²⁵ See §§ 650, 672 et seq.

²⁶ See § 676.

by a state commission merely by admitting the substantial allegations of the complaint.²⁷

§ 248. Judicial Review in Federal Court Cannot Be Obtained by Enjoining Suit in State Court.

Section 265 of the Judicial Code²⁸ forbids United States courts to enjoin proceedings in state courts, except in bankruptcy cases. Hence an attempt to obtain federal judicial review of a state agency order, by enjoining a state suit between private parties involving the order, will fail.²⁹ The prohibition applies only to state judicial proceedings, and does not affect proceedings of state courts which are legislative in character.³⁰

²⁷ United States Light & Heat Corp. v. Niagara Falls Gas & Electric Light Co. (C. C. A. 2d, 1931) 47 F. (2d) 567, cert. den. 283 U. S. 864, 75 L. Ed. 1469, 51 S. Ct. 656.

²⁸ 28 USCA 379.

²⁹ See § 653.

³⁰ See § 653.

PART IV
EXTENT AND SCOPE OF JUDICIAL REVIEW

SUBDIVISION I
GENERAL CONSIDERATIONS

CHAPTER 18
PRINCIPLES OF JUDICIAL REVIEW

I. IN GENERAL

- § 249. The General Scope of Judicial Review.
- § 250. Fundamental Analysis: Whether Questions Are Administrative or Judicial.
- § 251. Court Will Not Assume That Unlawful Administrative Action Is Intended.
- § 252. Suits by or Against Administrative Agencies Are Civil in Nature.

II. JUDICIAL REVIEW GOVERNED BY EQUITABLE PRINCIPLES

- § 253. Equitable Principles Govern.
- § 254. Powers of Equity Court to Be Adapted to Case.

**III. RES JUDICATA AND COMPANION PRINCIPLES OF
JUDICIAL ADMINISTRATION**

- § 255. In General.
- § 256. First Situation: Effect of Prior Administrative Determination in Subsequent Administrative Proceeding.
- § 257. Second Situation: Effect of Administrative Determination on Judicial Review.
- § 258. Third Situation: Effect of Judicial Review Decree in Subsequent Judicial Proceedings.
- § 259. Fourth Situation: Effect of Judicial Review Decree in Subsequent Administrative Proceedings.

I. IN GENERAL

§ 249. The General Scope of Judicial Review.

Judicial review may be had only on questions of law.¹ Generally, whether the Commission applies the legislative standards validly set up, whether it acts within the authority validly conferred, whether its proceedings satisfy the pertinent demands of due process, whether, in short, there is compliance with the legal requirements which fix the province of the Commission and govern its action, are appropriate questions for judicial decision.² Thus the authority of federal district

¹ See §§ 41, 423 et seq.

"Questions of law form the appropriate subject of judicial determinations. Dealing with activities admittedly within its regulatory power, the Congress established the Commission as its instrumentality to provide continuous and expert supervision and to exercise the administrative judgment essential in applying legislative standards to a host of instances. These standards the Congress prescribed. The powers of the Commission were defined, and definition is limitation. Whether the Commission applies the legislative standards validly set up, whether it acts within the authority conferred or goes beyond it, whether its proceedings satisfy the pertinent demands of due process, whether, in short, there is compliance with the legal requirements which fix the province of the Commission and govern its action, are appropriate questions for judicial decision. These are questions of law upon which the Court is to pass. The provision that the Commission's findings of fact, if supported by substantial evidence, shall be conclusive unless it clearly appears that the findings are arbitrary or capricious, cannot be regarded as an attempt to vest in the Court an authority to revise the action of the Commission from an administrative standpoint and to make

an administrative judgment. A finding without substantial evidence to support it—an arbitrary or capricious finding—does violence to the law. It is without the sanction of the authority conferred." (Mr. Chief Justice Hughes in *Federal Radio Commission v. Nelson Bros. Bond & Mtg. Co.* (1933) 289 U. S. 266, 276, 277, 77 L. Ed. 1166, 53 S. Ct. 627, 89 A. L. R. 406.)

² *Alien Cases.*

Lloyd Sabauda Societa Anonima v. Elting (1932) 287 U. S. 329, 77 L. Ed. 341, 53 S. Ct. 167.

Board of Tea Appeals.

Waite v. Macy (1918) 246 U. S. 606, 62 L. Ed. 892, 38 S. Ct. 395.

Federal Communications Commission.

* *Federal Communications Commission v. Pottsville Broadcasting Co.* (1940) 309 U. S. 134, 84 L. Ed. 656, 60 S. Ct. 437; *Rochester Telephone Corp. v. United States* (1939) 307 U. S. 125, 83 L. Ed. 1147, 59 S. Ct. 754.

Federal Radio Commission.

Federal Radio Commission v. Nelson Bros. Bond & Mtg. Co. (1933) 289 U. S. 266, 77 L. Ed. 1166, 53 S. Ct. 627, 89 A. L. R. 406.

Interstate Commerce Commission.

Interstate Commerce Commission v. Louisville & N. R. Co. (1913) 227 U. S. 88, 57 L. Ed. 431, 33 S. Ct. 185; *Interstate Commerce Commission v.*

courts in reviewing determinations of the Interstate Commerce Commission, is confined to determining whether the Commission's order violates the Constitution, or exceeds the power delegated by statute, or is an exercise of power so arbitrary as virtually to transcend the authority conferred.³ It is said that the scope of judicial review is whether an agency applies the legislative standards validly set up, whether it acts within the authority validly conferred, whether its proceedings satisfy the pertinent demands of due process, whether,

Union Pac. R. Co. (1912) 222 U. S. 541, 56 L. Ed. 308, 32 S. Ct. 108. See *Baltimore & O. R. Co. v. Domestic Hardwoods, Inc.* (1933) 62 App. D. C. 142, 65 F. (2d) 488, cert. den. 290 U. S. 647, 78 L. Ed. 561, 54 S. Ct. 64.

Quotations.

"There has been no attempt to make an exhaustive statement of the principle involved, but in cases thus far decided, it has been settled that the orders of the Commission are final unless (1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon a mistake of law. But questions of fact may be involved in the determination of questions of law, so that an order, regular on its face, may be set aside if it appears that (4) the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law; or (5) if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it; or (6) if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power. *Int. Com. Com. v. Ill. Cent.*, 215 U. S. 452, 470; *Southern Pacific v. Int. Com. Com.*, 219 U. S. 433; *Int. Com. Com. v. Northern Pacific*, 216 U. S. 538,

544; *Int. Com. Com. v. Alabama Midland Ry. Co.*, 168 U. S. 144, 174." (Mr. Justice Lamar in *Interstate Commerce Commission v. Union Pac. R. Co.* (1912) 222 U. S. 541, 547, 56 L. Ed. 308, 32 S. Ct. 108.)

"Beyond controversy, in determining whether an order of the commission shall be suspended or set aside, we must consider, a, all relevant questions of constitutional power or right; b, all pertinent questions as to whether the administrative order is within the scope of the delegated authority under which it purports to have been made; and, c, a proposition which we state independently, although in its essence it may be contained in the previous one, viz., whether, even although the order be in form within the delegated power, nevertheless it must be treated as not embraced therein, because the exertion of authority which is questioned has been manifested in such an unreasonable manner as to cause it, in truth, to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power. *Postal Telegraph Cable Company v. Adams*, 155 U. S. 688, 698. Plain as it is that the powers just stated are of the essence of judicial authority, and which, therefore, may not be curtailed, and whose discharge may not be by us in a proper case avoided, it is equally plain that such perennial powers lend no support whatever to

in short, there is compliance with the legal requirements which fix the province of the agency and govern its action.⁴

These questions fall into three categories: (1) questions of invasion of constitutional right or excess of constitutional power,⁵ (2) questions of an agency's statutory power and duty, or other pure questions of law,⁶ (3) and questions as to the basic prerequisites of proof underlying administrative determinations, such as the requirements relating to findings and their support in substantial evidence.⁷ The court's power is limited to defining the validity of administrative action on applicable principles of law, with the requirement that the controversy be remanded to the agency for the determination of any remaining administrative matters.⁸ Statutes giving a court power to do more than determine the validity of administrative action on legal principles have been construed as giving a court the power of legislative, not judicial, review.⁹ Unless a court has been given power of legisla-

the proposition that we may, under the guise of exerting judicial power, usurp merely administrative functions by setting aside a lawful administrative order upon our conception as to whether the administrative power has been wisely exercised.

"Power to make the order and not the mere expediency or wisdom of having made it, is the question." (Mr. Justice White in *Interstate Commerce Commission v. Illinois Cent. R. Co.* (1910) 215 U. S. 452, 470, 54 L. Ed. 280, 30 S. Ct. 155.)

"What has been said about the sufficiency of the existing provisions for judicial review applies only, of course, so long as the courts continue to discharge conscientiously the functions of review stated above. These require that, under whatever formula, the court should review the proceeding sufficiently to be satisfied that the administrative determination is not arbitrary and is within permissible bounds of administrative discretion. Between the limits of maximum and minimum review derived from the Constitution, the Congress has power to regulate the extent of

the courts' participation. When and if the Congress is dissatisfied with the existing review of particular types of administrative determinations, it then may and should, by specific and purposive legislation, provide for such change as it desires. Only by addressing itself to particular situations, and not by general legislation for all agencies and all types of determinations alike, can Congress make effective and desirable change." Final Report of the Attorney General's Committee on Administrative Procedure (1941) p. 92.

³ *United States v. New River Co.* (1924) 265 U. S. 533, 68 L. Ed. 1165, 44 S. Ct. 610; *Kansas City Southern R. Co. v. United States* (1913) 231 U. S. 423, 58 L. Ed. 296, 34 S. Ct. 125.

⁴ *Federal Communications Commission v. Pottsville Broadcasting Co.* (1940) 309 U. S. 134, 84 L. Ed. 656, 60 S. Ct. 437.

⁵ See § 261 et seq.

⁶ See § 423 et seq.

⁷ See § 505 et seq.

⁸ See § 788 et seq.

⁹ See § 45 et seq.

tive review, it has no power whatever to interfere with matters within the legislative province, that is, administrative questions. Accordingly it has no power to fix rates,¹⁰ or to interfere with the legislative province by imposing a condition relating to administrative matters in enjoining or refusing to enjoin confiscatory rates,¹¹ or in any other administrative respect. There is no right to trial by jury of the factual issues, legislative in character, committed for determination to an administrative agency, that is, administrative questions.¹²

Judicial review has developed in a manner typical of the common law.¹³ Originally growing up as isolated sets of principles from case to case in vertical substantive law channels, planks of common principles defining the validity of administrative action have gradually emerged, which now run horizontally through virtually all the fields of substantive law in which administrative agencies act.

§ 250. Fundamental Analysis: Whether Questions Are Administrative or Judicial.

The fundamental analysis which must be made in every case of judicial review is whether the assailed administrative action consti-

¹⁰ *Central Kentucky Natural Gas Co. v. Railroad Commission of Ky.* (1933) 290 U. S. 264, 78 L. Ed. 307, 54 S. Ct. 154; *West v. Chesapeake & Potomac Telephone Co.* (1935) 295 U. S. 662, 79 L. Ed. 1640, 55 S. Ct. 894.

¹¹ *Central Kentucky Natural Gas Co. v. Railroad Commission of Ky.* (1933) 290 U. S. 264, 78 L. Ed. 307, 54 S. Ct. 154.

¹² *Gee Wah Lee v. United States* (C. C. A. 5th, 1928) 25 F. (2d) 107, cert. den. 277 U. S. 608, 72 L. Ed. 1013, 48 S. Ct. 603.

¹³ "Judicial review of administrative action has developed even as the common law itself, gradually, from case to case, in response to the pressures of particular situations, the teachings of experience, the guidance of ideal and general principle, and the influence of legislation—with the courts playing a chief role in the development. As an incident of the administrative process, it shares many

of the features of that process. Just as administrative agencies have developed in response to the demands of new subjects and new legislation, so has judicial review responded to the needs of the changing system of administration. Just as there is diversity in administrative agencies, so is there diversity in the courts' review of their action. Just as there is some similarity and imitation in the organization and processes of the administrative tribunals, so is there similarity and imitation in the provisions for judicial review of the orders of these tribunals. Just as procedures appropriate for some agencies are entirely inappropriate for others, so is judicial review also molded by the needs of different situations. Like the agencies, judicial review is a complex of old and new, of historical survivals and purposive innovations." (Final Report of the Attorney General's Committee on Administrative Procedure, pp. 75, 76.)

tutes the determination of an administrative question, an initial decision on a constitutional or simple judicial question, or combinations of both. Profoundly differing rules govern the scope of judicial review of these two types of administrative action.¹⁴ Questions of law respecting administrative questions are few, and greatly restricted by the doctrine of administrative finality.¹⁵ On the other hand, a judicial question is inherently for independent judicial decision.¹⁶ This fundamental analysis inevitably poses the sweeping contrast between the doctrine of administrative finality on determinations of administrative questions, and the inconclusive effect of administrative decision of questions which are judicial in character and so are always open for independent decision by the courts.

Judicial questions are of two types: constitutional questions, the highest type of question in our legal system; and ordinary questions of law affecting private rights. The two types are treated separately herein because differing legal principles apply to each.¹⁷

§ 251. Court Will Not Assume That Unlawful Administrative Action Is Intended.

There can be occasion to speculate on future administrative proceedings. Hence courts will not assume that future administrative action will be arbitrary or otherwise unlawful.¹⁸ A court will not sup-

¹⁴ See Nathan Isaacs in "Judicial Review of Administrative Findings," (1921) 30 Yale L. Jour. 781, 783.

¹⁵ See § 505 et seq.

¹⁶ See §§ 41, 423 et seq.

¹⁷ See §§ 261, 423 et seq.

¹⁸ **Administrator of Wage and Hour Division.**

Redlands Foothill Groves v. Jacobs (D. C. S. D. Cal., Central Div., 1940) 30 F. Supp. 995.

Board of Tea Appeals.

Waite v. Macy (1918) 246 U. S. 606, 62 L. Ed. 892, 38 S. Ct. 395.

Interstate Commerce Commission.

Smith v. Interstate Commerce Commission (1917) 245 U. S. 33, 62 L. Ed. 135, 38 S. Ct. 30.

National Labor Relations Board.

Matter of National Labor Relations Board (1938) 304 U. S. 486, 82 L. Ed. 1482, 58 S. Ct. 1001.

State Agencies.

Natural Gas Pipeline Co. v. Slatery (1937) 302 U. S. 300, 82 L. Ed. 276, 58 S. Ct. 199; Pacific Telephone & Telegraph Co. v. Seattle (1934) 291 U. S. 300, 78 L. Ed. 810, 54 S. Ct. 383; Clark's Ferry Bridge Co. v. Public Service Commission (1934) 291 U. S. 227, 78 L. Ed. 767, 54 S. Ct. 427; Lawrence v. St. Louis-San Francisco R. Co. (1927) 274 U. S. 588, 71 L. Ed. 1219, 47 S. Ct. 720; Douglas v. Noble (1923) 261 U. S. 165, 67 L. Ed. 590, 43 S. Ct. 303; City of El Paso v. Texas Cities Gas Co. (C. C. A. 5th, 1938) 100 F. (2d) 501, cert. den. 306 U. S. 650, 83 L. Ed. 1049, 59 S. Ct. 592, rehearing denied (1939) 306 U. S. 669, 83 L. Ed. 1063, 59 S. Ct. 643.

pose or assume that an agency will impose a confiscatory rather than a reasonable rate;¹⁹ that it will reject an application to make such changes in a schedule of tentative rates as experience may show is necessary to produce a stipulated non-confiscatory revenue;²⁰ or that it will vacate an order, intending not to abandon it, but to "regularize" and reenter it.²¹ In fact, the validity of administrative action is presumed.²²

However, whether a particular type of administrative action has been threatened is a question of fact to be proved by evidence.²³

Where regulations exist for the guidance of an administrative board, promulgated by a superior officer, it will be presumed that the board will follow the regulations rather than the law generally.²⁴

§ 252. Suits by or Against Administrative Agencies Are Civil in Nature.

Suits involving judicial review of administrative action, or controversies with administrative agencies, are civil in nature. Court proceedings by administrative agencies to compel testimony are civil proceedings.²⁵ The mere presence of the United States as a party does not render them criminal. The Constitution²⁶ expressly contemplates the United States as a party to civil proceedings. A contempt proceeding by an agency serves only its purpose as a civil litigant, and is not a vindication of public justice.²⁷

II. JUDICIAL REVIEW GOVERNED BY EQUITABLE PRINCIPLES

§ 253. Equitable Principles Govern.

Judicial review, ordinarily accomplished by petition for review, or suit to suspend, enjoin enforcement of, annul or set aside an administrative order, is governed by the traditional principles, rules, and

¹⁹ *City of El Paso v. Texas Cities Gas Co.* (C. C. A. 5th, 1938) 100 F. (2d) 501, cert. den. 306 U. S. 650, 83 L. Ed. 1049, 59 S. Ct. 592, rehearing denied (1939) 306 U. S. 669, 83 L. Ed. 1063, 59 S. Ct. 643.

²⁰ *Clark's Ferry Bridge Co. v. Public Service Commission* (1934) 291 U. S. 227, 78 L. Ed. 767, 54 S. Ct. 427.

²¹ *Matter of National Labor Relations Board* (1938) 304 U. S. 486, 82 L. Ed. 1482, 58 S. Ct. 1001.

²² See § 755.

²³ See *Natural Gas Pipeline Co. v. Slattery* (1937) 302 U. S. 300, 82 L. Ed. 276, 58 S. Ct. 199. See also § 774.

²⁴ See *Waite v. Macy* (1918) 246 U. S. 606, 62 L. Ed. 892, 38 S. Ct. 395.

²⁵ *McCrone v. United States* (1939) 307 U. S. 61, 83 L. Ed. 1108, 59 S. Ct. 685.

²⁶ Article III, § 2.

²⁷ *McCrone v. United States* (1939) 307 U. S. 61, 83 L. Ed. 1108, 59 S. Ct. 685.

considerations of equity.²⁸ This rule applies not only to suits which seek equitable relief, but also to suits brought to enforce administrative orders, which are the identical counterpart of suits to enjoin enforcement of, suspend, set aside or annul administrative orders,²⁹ and so far as the character and scope of judicial review are concerned, the rule also applies to actions at law including suits for restitution³⁰ and petitions for writs of mandamus.³¹

It is well-established equitable doctrine that an application for an interlocutory injunction against enforcement of an administrative order is addressed to the sound discretion of the trial court, and that an order either granting or denying such an injunction will not be disturbed by an appellate court unless the discretion was improvidently exercised.³² That the doctrine to be followed in reviewing such an order applies in the case of an order of a court of three judges denying an interlocutory injunction does not admit of doubt.³³ The duty of the Supreme Court, therefore, upon an appeal from such an

28 Federal Trade Commission.

Chamber of Commerce of Minneapolis v. Federal Trade Commission (C. C. A. 8th, 1926) 13 F. (2d) 673.

Interstate Commerce Commission.

Inland Steel Co. v. United States (1939) 306 U. S. 153, 83 L. Ed. 557, 59 S. Ct. 415; Shields v. Utah Idaho C. R. Co. (1938) 305 U. S. 177, 83 L. Ed. 111, 59 S. Ct. 160; Alabama v. United States (1929) 279 U. S. 229, 73 L. Ed. 675, 49 S. Ct. 266. See Atlantic Coast Line R. Co. v. Florida (1935) 295 U. S. 301, 79 L. Ed. 1451, 55 S. Ct. 713, rehearing denied 295 U. S. 769, 79 L. Ed. 1710, 55 S. Ct. 911.

See also Stone, J., dissenting in United States v. Chicago, M., St. P. & P. R. Co. (1931) 282 U. S. 311, 75 L. Ed. 359, 51 S. Ct. 159.

National Labor Relations Board.

* Ford Motor Co. v. National Labor Relations Board (1938) 305 U. S. 364, 83 L. Ed. 221, 59 S. Ct. 301.

Secretary of Agriculture.

H. P. Hood & Sons v. United States (1939) 307 U. S. 588, 83 L. Ed. 1478, 59 S. Ct. 1019; United States v. Rock Royal Co-operative, Inc. (1939)

307 U. S. 533, 83 L. Ed. 1446, 59 S. Ct. 993; *United States v. Morgan (1939) 307 U. S. 183, 83 L. Ed. 1211, 59 S. Ct. 795.

State Agencies.

See State Corporation Commission v. Wichita Gas Co. (1934) 290 U. S. 561, 78 L. Ed. 500, 54 S. Ct. 321; United Fuel Gas Co. v. Railroad Commission (1929) 278 U. S. 300, 73 L. Ed. 390, 49 S. Ct. 150.

²⁹ Ford Motor Co. v. National Labor Relations Board (1938) 305 U. S. 364, 83 L. Ed. 221, 59 S. Ct. 301; Tagg Bros. & Moorhead v. United States (1930) 280 U. S. 420, 74 L. Ed. 524, 50 S. Ct. 220.

³⁰ Atlantic Coast Line R. Co. v. Florida (1935) 295 U. S. 301, 79 L. Ed. 1451, 55 S. Ct. 713, rehearing denied 295 U. S. 769, 79 L. Ed. 1710, 55 S. Ct. 911.

³¹ See § 698.

³² Alabama v. United States (1929) 279 U. S. 229, 73 L. Ed. 675, 49 S. Ct. 266.

³³ Alabama v. United States (1929) 279 U. S. 229, 73 L. Ed. 675, 49 S. Ct. 266.

order, at least generally, is not to decide the merits but simply to determine whether the discretion of the court below has been abused.³⁴

Where there is otherwise no protection for a party, a court under the Urgent Deficiencies Act³⁵ may draw upon its extraordinary equity powers.³⁶

The principle that one who comes into a court of equity must come with clean hands has been held not to apply to strikers ordered to be reinstated by an order of the National Labor Relations Board, in a proceeding by the Board as a governmental agency seeking enforcement of the order in the public interest.³⁷

§ 254. Powers of Equity Court to Be Adapted to Case.

If the reviewing court is a court of equity it may adapt all its equity powers to administrative law cases involving judicial review.³⁸ Jurisdiction to review the action of administrative agencies being ordinarily vested in a court with equity powers, the court, acting within the bounds of the statute and without intruding upon the administrative province, may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action. The purpose of the judicial review is consonant with that of the administrative proceeding itself — to secure a just result with a minimum of technical requirements.³⁹ The duty of a reviewing equity court to do equity is especially imperative where its injunction deprives the public of the benefit of lower rates and obstructs the agency's making a reparation order,⁴⁰ or otherwise frustrates the delegate of the legislature

³⁴ *Alabama v. United States* (1929) 279 U. S. 229, 73 L. Ed. 675, 49 S. Ct. 266.

For an instance of such abuse and reversal therefor, see *Gilchrist v. Interborough Rapid Transit Co.* (1929) 279 U. S. 159, 73 L. Ed. 652, 49 S. Ct. 282.

³⁵ 28 USCA 43-48.

³⁶ *Atlantic Coast Line R. Co. v. Florida* (1935) 295 U. S. 301, 79 L. Ed. 1451, 55 S. Ct. 713, rehearing denied 295 U. S. 769, 79 L. Ed. 1710, 55 S. Ct. 911.

³⁷ *Republic Steel Corp. v. National Labor Relations Board* (C. C. A. 3d, 1939) 107 F. (2d) 472, cert. den. 309 U. S. 684, 84 L. Ed. 1027, 60 S. Ct.

806, rehearing granted 310 U. S. 655, 84 L. Ed. 1419, 60 S. Ct. 1073.

³⁸ *Ford Motor Co. v. National Labor Relations Board* (1938) 305 U. S. 364, 83 L. Ed. 221, 59 S. Ct. 301, and cases cited. See *Stone, J.*, dissenting in *United States v. Chicago, M., St. P. & P. R. Co.* (1931) 282 U. S. 311, 75 L. Ed. 359, 51 S. Ct. 159.

³⁹ *Ford Motor Co. v. National Labor Relations Board* (1938) 305 U. S. 364, 83 L. Ed. 221, 59 S. Ct. 301; *National Labor Relations Board v. Boss Mfg. Co.* (C. C. A. 7th, 1939) 107 F. (2d) 574.

⁴⁰ *United States v. Morgan* (1939) 307 U. S. 183, 83 L. Ed. 1211, 59 S. Ct. 795.

in carrying out the policy of the act. It is familiar doctrine that the extent to which a court of equity may grant or withhold its aid, and the manner of moulding its remedies, may be affected by the public interest involved.⁴¹ When Congress establishes a public policy by statute, and an agency has made a determination in a proceeding before it, after full hearing, which the original reviewing court finds supported by evidence, the court should be astute to avoid the use of its process to effectuate the collection of unlawful rates, to direct it to the restitution of rates which it has taken into its own custody, once they are shown to be unlawful, and generally to exercise its discretion in such manner as to effectuate the policy of the statute and facilitate administration of the system which Congress set up.⁴² If there are proper findings, this duty is self-evident, notwithstanding the absence of any order of the administrative agency.⁴³

A suit for restitution of money paid under an order of the Interstate Commerce Commission may be equitable, and the equities determine even though the claim is made in an action triable in a court of law.⁴⁴ For instance restitution of money paid under a void order may be denied where such restitution would be inequitable, as where the order is void, used in the sense of voidable, for imperfections in form only, and a subsequent order in identical terms is held valid.⁴⁵ In such a case the fact that the lower rates forbidden by the void first order were confiscatory is an added equity for the carrier who collected the higher rates.⁴⁶

But the fact that judicial review is equitable does not enlarge the remedy beyond what is required to assure proper administrative action.⁴⁷ The reviewing court may not sustain or award relief beyond the power of the agency reviewed, the review being appellate and at

⁴¹ *United States v. Morgan* (1939) 307 U. S. 183, 83 L. Ed. 1211, 59 S. Ct. 795.

⁴² *United States v. Morgan* (1939) 307 U. S. 183, 83 L. Ed. 1211, 59 S. Ct. 795.

⁴³ *United States v. Morgan* (1939) 307 U. S. 183, 83 L. Ed. 1211, 59 S. Ct. 795.

⁴⁴ *Atlantic Coast Line R. Co. v. Florida* (1935) 295 U. S. 301, 79 L. Ed. 1451, 55 S. Ct. 713, rehearing denied 295 U. S. 769, 79 L. Ed. 1710, 55 S. Ct. 911.

⁴⁵ *Atlantic Coast Line R. Co. v. Florida* (1935) 295 U. S. 301, 79 L. Ed. 1451, 55 S. Ct. 713, rehearing denied 295 U. S. 769, 79 L. Ed. 1710, 55 S. Ct. 911.

⁴⁶ *Atlantic Coast Line R. Co. v. Florida* (1935) 295 U. S. 301, 79 L. Ed. 1451, 55 S. Ct. 713, rehearing denied 295 U. S. 769, 79 L. Ed. 1710, 55 S. Ct. 911.

⁴⁷ See *Federal Trade Commission v. Eastman Kodak Co.* (1927) 274 U. S. 619, 71 L. Ed. 1238, 47 S. Ct. 688. See also § 515 et seq.

most revisory merely, and not an exercise of original jurisdiction by the court itself.⁴⁸

III. RES JUDICATA AND COMPANION PRINCIPLES OF JUDICIAL ADMINISTRATION

§ 255. In General.

Cases discussing the application to administrative agencies of the judicial principle of *res judicata* and companion principles of judicial administration, involve four possible situations: (1) Whether an administrative determination is binding on the agency in a subsequent administrative proceeding;⁴⁹ (2) whether an administrative determination is binding on a court on judicial review;⁵⁰ (3) whether a decision on judicial review is binding in a subsequent suit for judicial review;⁵¹ and (4) whether a decision on judicial review is binding in a subsequent administrative proceeding.⁵²

§ 256. First Situation: Effect of Prior Administrative Determination in Subsequent Administrative Proceeding.

An administrative agency is an instrument of the executive or legislature, and may exercise power of either executive or legislative character. But it does not exercise judicial power and is not a court. Although it may venture a decision on a judicial question, such a decision is not binding and is the appropriate subject for independent decision by an appropriate court acting judicially.⁵³ This is virtually the only semi-judicial attribute of administrative power. Thus the judicial attribute of *res judicata* does not apply to administrative determinations. They cannot constitute *res judicata* in any technical sense, although whether a particular administrative determination is final depends upon what Congress intended.⁵⁴ Hence an administrative determination of an administrative question is not *res judicata* or otherwise binding when that question is again raised before an agency.⁵⁵

⁴⁸ See *Federal Trade Commission v. Eastman Kodak Co.* (1927) 274 U. S. 619, 71 L. Ed. 1238, 47 S. Ct. 688.

⁴⁹ See § 256.

⁵⁰ See § 257.

⁵¹ See § 258.

⁵² See § 259.

⁵³ See §§ 73, 423 et seq.

⁵⁴ *Pearson v. Williams* (1906) 202 U. S. 281, 50 L. Ed. 1029, 26 S. Ct. 608. See *Wilbur v. United States ex rel. Kadrie* (1930) 281 U. S. 206, 74 L. Ed. 809, 50 S. Ct. 320.

⁵⁵ *Alien Cases*.

* *Pearson v. Williams* (1906) 202 U. S. 281, 50 L. Ed. 1029, 26 S. Ct.

Upon judicial review, therefore, it cannot be objected that administrative findings or orders are inconsistent with those made in other cases. This is a matter of discretion for the agency.⁵⁶ The court is concerned only with the agency's present determinations based upon the current evidence.⁵⁷ Thus the placing of Indians upon tribal rolls by the Secretary of the Interior is not a judgment pronounced in a judicial proceeding but a ruling made by an executive officer in the exertion of administrative authority. That authority is neither exhausted nor terminated by its exertion on a prior occasion, but is in its nature continuing. Under it the Secretary who made the determination could reconsider the matter and revoke the determination if found wrong, and so could his successor.⁵⁸ Similarly, orders of the Interstate Commerce Commission are not grants in perpetuity. Neither a carrier nor a favored community acquires vested rights. Necessarily implied in each order is the term "until otherwise ordered by the Commission," and the original application is always subject to be reopened.⁵⁹

608; *Flynn ex rel. Ham Loy Wong v. Ward* (C. C. A. 1st, 1938) 95 F. (2d) 742.

Federal Communications Commission.

Greater Kampeska Radio Corp. v. Federal Communications Commission (1939) 71 App. D. C. 117, 108 F. (2d) 5.

Interstate Commerce Commission.

Shields v. Utah Idaho C. R. Co. (1938) 305 U. S. 177, 83 L. Ed. 111, 59 S. Ct. 160; *Piedmont & N. R. Co. v. United States* (1930) 280 U. S. 469, 74 L. Ed. 551, 50 S. Ct. 192; *Skinner & Eddy Corp. v. United States* (1919) 249 U. S. 557, 63 L. Ed. 772, 39 S. Ct. 375; *Youngstown Sheet & Tube Co. v. United States* (D. C. Ohio, 1934) 7 F. Supp. 33, aff'd 295 U. S. 476, 79 L. Ed. 1553, 55 S. Ct. 822, rehearing denied 296 U. S. 661, 80 L. Ed. 471, 56 S. Ct. 81. See *Western Paper Makers' Chemical Co. v. United States* (1926) 271 U. S. 268, 70 L. Ed. 941, 46 S. Ct. 500.

Secretary of Agriculture.

St. Joseph Stock Yards Co. v. United States (1936) 298 U. S. 38, 80 L. Ed. 1033, 59 S. Ct. 720; *Tagg Bros. & Moorhead v. United States*

(1930) 280 U. S. 420, 74 L. Ed. 524, 50 S. Ct. 220.

Secretary of the Interior.

* *Wilbur v. United States ex rel. Kadrie* (1930) 281 U. S. 206, 74 L. Ed. 809, 50 S. Ct. 320; *West v. Standard Oil Co.* (1929) 278 U. S. 200, 73 L. Ed. 265, 49 S. Ct. 138.

State Agencies.

Georgia Public Service Commission v. United States (1931) 283 U. S. 765, 75 L. Ed. 1397, 51 S. Ct. 619. See *Clark's Ferry Bridge Co. v. Public Service Commission* (1934) 291 U. S. 227, 78 L. Ed. 767, 54 S. Ct. 427.

⁵⁶ *Georgia Public Service Commission v. United States* (1931) 283 U. S. 765, 75 L. Ed. 1397, 51 S. Ct. 619.

⁵⁷ *Youngstown Sheet & Tube Co. v. United States* (D. C. Ohio, 1934) 7 F. Supp. 33, aff'd 295 U. S. 476, 79 L. Ed. 1553, 55 S. Ct. 822, rehearing denied 296 U. S. 661, 80 L. Ed. 471, 56 S. Ct. 81.

⁵⁸ *Wilbur v. United States ex rel. Kadrie* (1930) 281 U. S. 206, 74 L. Ed. 809, 50 S. Ct. 320.

⁵⁹ *Skinner & Eddy Corp. v. United States* (1919) 249 U. S. 557, 63 L. Ed. 772, 39 S. Ct. 375.

The determinations of another agency, with diverse powers and functions, are at most a bit of evidence, to be weighed along with much other evidence; they cannot affect a conclusion based on evidence otherwise sufficient, and are never conclusive.⁶⁰ Even where a statute⁶¹ makes the determinations of one agency binding upon another, they are binding by force of the statute, and not by any application of the doctrine of *res judicata*.⁶² No principle of *res judicata* may interfere with the vacation of an administrative order, the reopening of a proceeding, or the institution of a new proceeding.⁶³

Where cost conditions have not changed materially, and an agency finds, after hearing evidence of alleged changes, that value is the same figure which it found six years before, the agency is not treating its first determination as *res judicata*.⁶⁴

A fortiori, a previous venture at decision of a judicial question by an administrative agency does not constitute *res judicata*.⁶⁵ Thus its decision, even when consistent with a correct construction of a statute, that it lacks a given power, constitutes no limitation upon its jurisdiction. The agency may disregard one of its rules embodying the decision.⁶⁶

There can obviously be no question of *res judicata* where the agency acts quasi-legislatively.⁶⁷

§ 257. Second Situation: Effect of Administrative Determination on Judicial Review.

An administrative determination is never binding on a court on any principle of *res judicata*.⁶⁸ An administrative order not being a

⁶⁰ Federal Trade Commission v. Al-goma Lumber Co. (1934) 291 U. S. 67, 78 L. Ed. 655, 54 S. Ct. 315.

⁶¹ E. g., the Railway Labor Act, 45 USCA 151-188.

⁶² See Shields v. Utah Idaho C. R. Co. (1938) 305 U. S. 177, 83 L. Ed. 111, 59 S. Ct. 160.

⁶³ St. Joseph Stock Yards Co. v. United States (1936) 298 U. S. 38, 80 L. Ed. 1033, 59 S. Ct. 720; Tagg Bros. & Moorhead v. United States (1930) 280 U. S. 420, 74 L. Ed. 524, 50 S. Ct. 220.

⁶⁴ Clark's Ferry Bridge Co. v. Public Service Commission (1934) 291 U.

S. 227, 78 L. Ed. 767, 54 S. Ct. 427.

⁶⁵ Spiller v. Atchison, T. & S. F. R. Co. (1920) 253 U. S. 117, 64 L. Ed. 810, 40 S. Ct. 466; Flynn ex rel. Ham Loy Wong v. Ward (C. C. A. 1st, 1938) 95 F. (2d) 742; Mock Kee Song v. Cahill (C. C. A. 9th, 1938) 94 F. (2d) 975. See also § 423 et seq.

⁶⁶ Spiller v. Atchison, T. & S. F. R. Co. (1920) 253 U. S. 117, 64 L. Ed. 810, 40 S. Ct. 466.

⁶⁷ Arizona Grocery Co. v. Atchison, T. & S. F. R. Co. (1932) 284 U. S. 370, 76 L. Ed. 348, 52 S. Ct. 183.

⁶⁸ Oklahoma Packing Co. v. Oklahoma Gas & Electric Co. (1939) 309

judgment, in the sense of a final adjudication, parties are not concluded by the determination.⁶⁹ Indeed, on judicial questions a binding decision may only be made by an appropriate court acting judicially, and judicial review may always be had on judicial questions.⁷⁰

This rule applies to all administrative determinations, by whomsoever made. Thus, even where the determination is made by the Supreme Court of a state, it is not *res judicata* where, as formerly in Oklahoma, review of agencies by the court was legislative and not judicial.⁷¹ State law is controlling in the Supreme Court on the issue of whether review in a state court is judicial or legislative.⁷²

However, it has been held that all questions raised in proceedings before the Board of Tax Appeals are *res judicata* in a subsequent action to recover taxes paid, brought in the federal district court.⁷³ The holding of that case would appear to be supportable on the ground that Congress intended that a determination of the Board of Tax Appeals may not be reviewed by suit in a district court.

The failure of a party to seek judicial review of an administrative order, when the right of judicial review becomes first available, does not render *res judicata* the administrative determination which could have been reviewed.⁷⁴ Thus where a railroad claiming exemption from supervision of the Interstate Commerce Commission, on the ground that it is an "interurban," nevertheless applied for a certificate of public convenience for a proposed extension of its line, neither the assumption of jurisdiction by the agency nor its denial of the application is *res judicata* on the questions involved despite failure to seek judicial review at once.⁷⁵ And review of an administrative determina-

U. S. 4, 84 L. Ed. 537, 60 S. Ct. 215, rehearing denied (1940) 309 U. S. 693, 84 L. Ed. 1034, 60 S. Ct. 465; State Corporation Commission of Kansas v. Wichita Gas Co. (1934) 290 U. S. 561, 78 L. Ed. 500, 54 S. Ct. 321; Prentis v. Atlantic Coast Line Co. (1908) 211 U. S. 210, 53 L. Ed. 150, 29 S. Ct. 67.

⁶⁹ Degge v. Hitchcock (1913) 229 U. S. 162, 57 L. Ed. 1135, 33 S. Ct. 639.

⁷⁰ See §§ 41, 73, 423 et seq.

⁷¹ Oklahoma Packing Co. v. Oklahoma Gas & Electric Co. (1939) 309 U. S. 4, 84 L. Ed. 537, 60 S. Ct. 215, rehearing denied (1940) 309 U. S. 693, 84 L. Ed. 1034, 60 S. Ct. 465; Prentis

v. Atlantic Coast Line Co. (1908) 211 U. S. 210, 53 L. Ed. 150, 29 S. Ct. 67.

⁷² Oklahoma Packing Co. v. Oklahoma Gas & Electric Co. (1939) 309 U. S. 4, 84 L. Ed. 537, 60 S. Ct. 215, rehearing denied (1940) 309 U. S. 693, 84 L. Ed. 1034, 60 S. Ct. 465. See also § 45.

⁷³ Greylock Mills v. White (D. C. D. Mass. 1932) 55 F. (2d) 704, cert. den. 289 U. S. 760, 77 L. Ed. 1503, 53 S. Ct. 793.

⁷⁴ Piedmont & N. R. Co. v. United States (1930) 280 U. S. 469, 74 L. Ed. 551, 50 S. Ct. 192.

⁷⁵ Piedmont & N. R. Co. v. United States (1930) 280 U. S. 469, 74 L. Ed. 551, 50 S. Ct. 192.

tion is not barred by any rule of *res judicata* because a subsequent administrative determination to the same effect has not been assailed by judicial review.⁷⁶

§ 258. Third Situation: Effect of Judicial Review Decree in Subsequent Judicial Proceedings.

A decision of a court on judicial review as to the validity of an administrative order, which ends the litigation and forever settles the matter, including the question of validity of the administrative order, between the parties as the result of a contest which the parties have accepted or by which they must abide, is *res judicata* in the orthodox sense. This is the case where both suits are brought in the federal courts.⁷⁷

It is also the case where the first suit is brought in a state court and the second in a federal court.⁷⁸ Thus where an order of a state agency has been upheld on judicial review in a state court having full jurisdiction of the questions involved, the state court decision is *res judicata* on all questions that were raised or could have been raised, including questions as to the validity of the order under the federal constitution,⁷⁹ and questions of jurisdiction which were decided.⁸⁰ Denial of

⁷⁶ *Nachod & United States Signal Co. v. Helvering* (C. C. A. 6th, 1934) 74 F. (2d) 164.

⁷⁷ *Old Colony Trust Co. v. Commissioner of Internal Revenue* (1929) 279 U. S. 716, 73 L. Ed. 918, 49 S. Ct. 499; *United States ex rel. Donner Steel Co. v. Interstate Commerce Commission* (1925) 56 App. D. C. 44, 8 F. (2d) 905, cert. den. 270 U. S. 651, 70 L. Ed. 781, 46 S. Ct. 351.

⁷⁸ *State Agencies.*

New York State Electric & Gas Corp. v. Public Service Commission of N. Y. (C. C. A. 2d, 1939) 102 F. (2d) 453; *Lehigh Valley R. Co. of N. J. v. Martin* (C. C. A. 3d, 1938) 100 F. (2d) 139; *Southern Pac. Co. v. Van Hoosear* (C. C. A. 9th, 1934) 72 F. (2d) 903; *Missouri Pac. R. Corp. v. Nebraska State Railroad Commission* (C. C. A. 8th, 1933) 65 F. (2d) 557, cert. den. 290 U. S. 656, 78 L. Ed. 568, 54 S. Ct. 72; *Wallace Ranch Water Co. v. Railroad Commission of*

Calif. (C. C. A. 9th, 1931) 47 F. (2d) 8; *Central Kentucky Natural Gas Co. v. Railroad Commission of Ky.* (D. C. E. D. Ky., 1930) 37 F. (2d) 938; *Adams v. Decoto* (D. C. S. D. Cal., S. Div., 1927) 21 F. (2d) 221; *Long Island Water Corp. v. Public Service Commission of N. Y.* (D. C. S. D. N. Y., 1938) 23 F. Supp. 834.

⁷⁹ *State Agencies.*

New York State Electric & Gas Corp. v. Public Service Commission of N. Y. (C. C. A. 2d, 1939) 102 F. (2d) 453; *Lehigh Valley R. Co. of N. J. v. Martin* (C. C. A. 3d, 1938) 100 F. (2d) 139; *Central Kentucky Natural Gas Co. v. Railroad Commission of Ky.* (D. C. E. D. Ky., 1930) 37 F. (2d) 938; *Long Island Water Corp. v. Public Service Commission of N. Y.* (D. C. S. D. N. Y., 1938) 23 F. Supp. 834.

⁸⁰ *State Agencies.*

Southern Pac. Co. v. Van Hoosear (C. C. A. 9th, 1934) 72 F. (2d) 903; *Betts v. Railroad Commission of*

a petition for review by a state court may be an affirmance on the merits of an attack on administrative order and become *res judicata*.⁸¹ Dicta, of course, cannot be the basis of *res judicata*.⁸²

Where the review in the state's highest court is legislative, the doctrine of *res judicata* does not apply; and a subsequent decision overruling a long list of cases, and declaring that review in the state's highest court is judicial will not cause the principle to operate for cases determined when the review was thought to be administrative.⁸³

Where two remedies relating to taxes are pursued, the one in a district court for refund, and the other on a petition for review in the Circuit Court of Appeals, the judgment which is first rendered will then put an end to the questions involved as *res judicata*, and in effect make all proceedings in the other court of no avail. Whichever judgment is first in time is necessarily final to the extent to which it becomes a judgment.⁸⁴

In attacking the validity of an order in a court, it is incumbent on the attacking party to present, in support of his asserted right of attack, every available ground of which he has knowledge. He is not at liberty to prosecute that right by piecemeal, as by presenting a part only of the available grounds and reserving others.⁸⁵ Thus, where a litigant attacks a state order in a federal court, after the State Supreme Court has decided the order is valid, and he alleges a ground not brought to the attention of the state court, although known to him at the time of the state suit, the federal suit will be dismissed.⁸⁶ As the

Calif. (D. C. S. D. Calif., Cent. Div., 1933) 6 F. Supp. 591, aff'd 291 U. S. 652, 78 L. Ed. 1046, 54 S. Ct. 563, rehearing denied 292 U. S. 604, 78 L. Ed. 1466, 54 S. Ct. 713.

⁸¹ State Agencies.

Southern Pac. Co. v. Van Hoosear (C. C. A. 9th, 1934) 72 F. (2d) 903; *Wallace Ranch Water Co. v. Railroad Commission of Calif. (C. C. A. 9th, 1931) 47 F. (2d) 8; Adams v. Decoto (D. C. S. D. Cal., S. Div., 1927) 21 F. (2d) 221; Oilwell Express Corp. v. Railroad Commission of Cal. (D. C. S. D. Cal., Cent. Div., 1935) 11 F. Supp. 665; Betts v. Railroad Commission (D. C. S. D. Cal., Cent. Div., 1933) 6 F. Supp. 591, aff'd 291 U. S. 652, 78 L. Ed. 1046, 54 S. Ct. 563, rehearing denied 292 U. S. 604, 78 L. Ed. 1466, 54 S. Ct. 713; Finn v.

Railroad Commission (D. C. N. D. Cal., S. Div., 1933) 2 F. Supp. 891.

⁸² Mutual Orange Distributors v. Agricultural Prorate Commission (D. C. S. D. Cal., Cent. Div., 1940) 30 F. Supp. 937.

⁸³ Cary v. Corporation Commission of Oklahoma (D. C. W. D. Okla., 1936) 17 F. Supp. 772.

⁸⁴ Old Colony Trust Co. v. Commissioner of Internal Revenue (1929) 279 U. S. 716, 73 L. Ed. 918, 49 S. Ct. 499.

⁸⁵ Grubb v. Public Utilities Commission of Ohio (1930) 281 U. S. 470, 74 L. Ed. 972, 50 S. Ct. 374. See Wong Doo v. United States (1924) 265 U. S. 239, 68 L. Ed. 999, 44 S. Ct. 524.

⁸⁶ Grubb v. Public Utilities Commission of Ohio (1930) 281 U. S. 470, 74 L. Ed. 972, 50 S. Ct. 374.

ground was available but not put forward, he must abide by the rule that a judgment on the merits in one suit is *res judicata* in another where the parties and subject-matter are the same, not only as respects matters actually presented to sustain or defeat the right asserted, but also as respects any other available matter which might have been presented to that end.⁸⁷ In such case the decision first made is *res judicata* despite the fact that it is not the decision of the court which first took jurisdiction. Jurisdiction is concurrent and the suit is not *in rem*.⁸⁸

Even where *res judicata* does not apply as in a decision on a petition for a writ of *habeas corpus*,⁸⁹ the court in its sound discretion, may dismiss a second petition because of the dismissal of the first, when the ground for the second was set up, with another, in the first, and evidence to support it then withheld in bad faith, for use in a second attempt if the first failed. Otherwise, by such abuse, execution of the administrative order could be postponed indefinitely.⁹⁰

Where the validity of a particular administrative order, or of an order involving substantially the same administrative or judicial questions, has been upheld by the Supreme Court, contentions respecting those questions are foreclosed by the prior decision, although the doctrine of *res judicata* does not apply.⁹¹

But dismissal without prejudice of a suit to set aside an administrative order is not *res judicata* as to the validity of the order or anything else.⁹² And dismissal for lack of jurisdiction by the Supreme Court of a bill attacking an administrative order and seeking to invoke its original jurisdiction, while an authority, is not *res judicata* in a suit brought in a district court to set aside the order.⁹³

§ 259. Fourth Situation: Effect of Judicial Review Decree in Subsequent Administrative Proceedings.

A decree on judicial review which is *res judicata* as set forth in the preceding section, has that effect in subsequent administrative pro-

⁸⁷ Grubb v. Public Utilities Commission of Ohio (1930) 281 U. S. 470, 74 L. Ed. 972, 50 S. Ct. 374.

⁸⁸ Grubb v. Public Utilities Commission of Ohio (1930) 281 U. S. 470, 74 L. Ed. 972, 50 S. Ct. 374.

⁸⁹ See § 708.

⁹⁰ Wong Doo v. United States (1924) 265 U. S. 239, 68 L. Ed. 999, 44 S. Ct. 524.

⁹¹ United States v. Pan American Petroleum Corp. (1938) 304 U. S. 156, 82 L. Ed. 1262, 58 S. Ct. 771.

⁹² Vandalia R. Co. v. Schnull (1921) 255 U. S. 113, 65 L. Ed. 539, 41 S. Ct. 324.

⁹³ North Dakota ex rel. Lemke v. Chicago & N. W. R. Co. (1922) 257 U. S. 485, 66 L. Ed. 329, 42 S. Ct. 170.

ceedings as well as in subsequent judicial proceedings.^{93a} However, since an administrative inquiry is not a criminal prosecution,⁹⁴ a verdict and judgment acquitting an alien indicted for violation of the immigration laws is not *res judicata* in a deportation proceeding arising out of the same offense. The issue presented by the traverse of the indictment is not identical with the matter determined by the Secretary of Labor. And besides, the acquittal under the indictment was not equivalent to an affirmative finding of innocence, but merely to an adjudication that the proof was not sufficient to overcome all reasonable doubt of the guilt of the accused.⁹⁵

Where on judicial review an administrative order is vacated because the administrative proceedings upon which it depends were irregularly conducted, this does not preclude initiation of proper administrative proceedings.⁹⁶

^{93a} *Miller v. Standard Nut Margarine Co. of Florida* (1932) 284 U. S. 498, 76 L. Ed. 422, 52 S. Ct. 260.

⁹⁴ *United States ex rel. Bilokumsky v. Tod* (1923) 263 U. S. 149, 68 L. Ed. 221, 44 S. Ct. 54; *Lewis v. Frick* (1914) 233 U. S. 291, 58 L. Ed. 967, 34 S. Ct. 488.

⁹⁵ *Lewis v. Frick* (1914) 233 U. S. 291, 58 L. Ed. 967, 34 S. Ct. 488; *United States ex rel. Mastoras v. McCandless* (C. C. A. 3d, 1932) 61 F. (2d) 366.

⁹⁶ *Chan Nom Gee v. United States* (C. C. A. 9th, 1932) 57 F. (2d) 646. See also § 274 et seq.

SUBDIVISION II

EXTENT AND SCOPE OF JUDICIAL REVIEW OF ADMINISTRATIVE SANCTIONS

CHAPTER 19

IN GENERAL

§ 260. Nature and Reviewability of Administrative Sanctions.

An administrative sanction is the order or other direction of an agency, mandatory in nature, commanding that particular action be taken. It is comparable to the judgment or decree of a court. Usually it applies the legislative mandate to a particular party upon the basis of findings that the standards for application of that mandate exist in a particular case.

General administrative directions for the conduct of future action, applicable to an entire class not specifically named, usually called regulations, are, however, purely legislative and require no specific findings to the effect that statutory standards have been met.¹

A specific administrative sanction may be assailed in either one of two ways where the direction is mere repetition of the statutory mandate. The face of the statute as applied by an administrative order may be assailed as exceeding the power of the legislature, without questioning the validity of the administrative action involved.² Such questions may be resolved without resorting to principles of administrative law. An administrative sanction may also be attacked judicially where it is not legally appropriate for the facts found, that is, the findings upon which it is based.³ Questions so raised involve the validity of administrative action and are questions of administrative law.

The validity and authority of an administrative sanction must be determined by its operation and effect. The motives and purposes of the agency in making the sanction are not germane to the inquiry.⁴

¹ See § 439 et seq.

³ See § 437.

² American Telephone & Telegraph Co. v. United States (1936) 299 U. S. 232, 81 L. Ed. 142, 57 S. Ct. 170.

⁴ Texport Carrier Corp. v. Smith (D. C. S. D. Tex., Austin Div., 1934) 8 F. Supp. 28.

Where statutory provisions give an administrative agency a discretionary option to apply one of two or more sanctions to the party involved, upon the basis of certain findings of fact, the exercise of such discretion is not subject to judicial review. If the sanction selected by the agency is legally appropriate for the facts found, there is no occasion for judicial review. Private persons have no right to a particular selection of optional administrative sanctions, and the matter of choice is entirely one of administrative discretion.⁵ Thus, where Congress has provided an alternate method of assessing corporate income taxes, to be used by the Commissioner at his discretion, where he considers hardship would result from an assessment on the ordinary basis, no court has power to review the grant or denial of a special assessment or the correctness of the computation made thereon, in the absence of a showing of arbitrariness or fraud.^{5a}

A comparable provision is to be found in the National Labor Relations Act, where the Board is authorized to "take such affirmative action" as will "effectuate the policies" of the act.⁶ The effect of this provision is to give the Board a wide discretion to devise such sanction as may be appropriate, and the Board's discretion in the selection of any sanction which is legally appropriate for the facts found, is not judicially reviewable.^{6a}

5 Commissioner of Internal Revenue.

Welch v. Obispo Oil Co. (1937) 301 U. S. 190, 81 L. Ed. 1033, 57 S. Ct. 684; Heiner v. Diamond Alkali Co. (1933) 288 U. S. 502, 77 L. Ed. 921, 53 S. Ct. 413; United States v. Henry Prentiss & Co., Inc. (1933) 288 U. S. 73, 77 L. Ed. 626, 53 S. Ct. 233; Williamsport Wire Rope Co. v. United States (1928) 277 U. S. 551, 72 L. Ed. 985, 48 S. Ct. 587; National Park Bank v. United States (C. C. A. 2d, 1933) 65 F. (2d) 415, cert. den. 290 U. S. 664, 78 L. Ed. 574, 54 S. Ct. 78; Standard Rice Co., Inc. v. Commis-

sioner of Internal Revenue (C. C. A. 5th, 1930) 41 F. (2d) 481. See Blair v. Oesterlein Mach. Co. (1927) 275 U. S. 220, 72 L. Ed. 249, 48 S. Ct. 87. National Labor Relations Board.

National Labor Relations Board v. Bradford Dyeing Ass'n (1940) 310 U. S. 318, 84 L. Ed. 1226, 60 S. Ct. 918.

^{5a} See the tax cases cited in note 5.

⁶ 29 USCA 160(c).

^{6a} National Labor Relations Board v. Bradford Dyeing Ass'n (1940) 310 U. S. 318, 84 L. Ed. 1226, 60 S. Ct. 918. See § 437.

SUBDIVISION III

EXTENT AND SCOPE OF JUDICIAL REVIEW ON ADMINISTRATIVE DECISIONS OF CON- STITUTIONAL QUESTIONS

§ 261. Introduction.

Constitutional questions are questions which must be decided, both on the facts and the law, by courts. Thus not only is a decision by an administrative agency on a constitutional question of no importance whatever, but the facts upon which decision of a constitutional question depends may not be determined by an administrative agency subject to the doctrine of administrative finality.⁷ All constitutional questions must be tried *de novo* by a reviewing court.⁸ This does not mean, however, that every question of fact, that is, every administrative question determined by an administrative agency in a particular case, must be tried *de novo* in the reviewing court just because denial of a constitutional right is alleged. Only the questions of fact upon which hangs the decision of the constitutional question require a trial *de novo*.⁹

Constitutional questions raised as the result of administrative proceedings include questions as to denial of procedural due process;¹⁰ deprivation of property without due process of law, which arise principally in confiscation cases;¹¹ deprivation of rights as a citizen of the United States;¹² deprivation of the equal protection of the laws, of which the commonest instance is administrative discrimination;¹³ and questions of constitutional jurisdiction or power, sometimes called "jurisdictional fact" cases.¹⁴

Whether procedural due process has been denied can often be determined *de novo* from examination of the administrative record, but where it is necessary to go outside the administrative record, by interrogatories to the agency, or otherwise, it is proper to do so.¹⁵ Other constitutional questions are tried *de novo* in the reviewing

⁷ Compare § 505 et seq.

⁸ See § 262 et seq.

⁹ See § 264.

¹⁰ See § 274 et seq.

¹¹ See § 323 et seq.

¹² See § 400.

¹³ See § 401 et seq.

¹⁴ See § 265 et seq.

¹⁵ See § 733.

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court without the necessity of relying exclusively upon the administrative record.¹⁶

The next chapter discusses only the right to trial *de novo* and its constitutional basis. The function of the court upon trial *de novo*, and practice matters are treated elsewhere.¹⁷

¹⁶ See § 262 et seq.

¹⁷ See § 745 et seq.

CHAPTER 20

RIGHT TO TRIAL DE NOVO

- § 262. Constitutional Questions Must Be Tried De Novo.
- § 263. Constitutional Basis for the Rule.
- § 264. Extent of the Right.
- § 265. Questions of Constitutional Jurisdiction and Power.
- § 266. —Compensation Cases: Constitutional Jurisdiction and Power of Congress to Impose Liability Without Fault.
- § 267. —Military Cases: Constitutional Jurisdiction of Officer: Allegation of No Enlistment.
- § 268. —Public Lands Cases: Constitutional Jurisdiction of Agency: Existence of Subject.
- § 269. —Citizenship Cases.
- § 270. —Post-Office Cases: Constitutional Authority of the Postmaster-General: Nature of a Publication.
- § 270A. Questions of Constitutional Right.
- § 271. —Confiscation Cases: Due Process.
- § 272. —Administrative Discrimination Cases: Equal Protection.
- § 273. Interstate Commerce Cases.

§ 262. Constitutional Questions Must Be Tried De Novo.

Questions of constitutional right and power raised by administrative action are none the less appropriate for the exercise of the judicial power, and must be tried *de novo*. Trial *de novo* has two outstanding characteristics, (1) the reviewing court must reach its own independent judgment on the facts and on the law, without being bound by the rule of administrative finality on the facts,¹ and (2) additional evidence may be introduced, so that the case need not be decided on the administrative record alone.²

¹ "In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function." (Mr. Chief Justice Hughes in *Crowell v. Benson* (1932) 285 U. S. 22, 60, 76 L. Ed. 598, 52 S. Ct. 285.)

See Forrest R. Black in "The 'Jurisdictional Fact' Theory and Adminis-

trative Finality," (1937) 22 Cornell L. Quar. 349, 515.

² "Assuming that the Federal court may determine for itself the existence of these fundamental or jurisdictional facts, we come to the question,—Upon what record is the determination to be made? There is no provision of the statute which seeks to confine the court in such a case to the record before the deputy commissioner or to the evidence which he has taken. The

Courts must decide *de novo* whether the action of an agency is repugnant to the Constitution,³ whether an order deprives a party of his property without due process of law⁴ or denies him a hearing and thus denies due process of law,⁵ deprives him of the right of free speech,⁶ is destructive of the rights of a free press,⁷ or impairs the obligation of a contract,⁸ whether interstate commerce is involved,⁹

remedy which the statute makes available is not by an appeal or by a writ of certiorari for a review of his determination upon the record before him. The remedy is 'through injunction proceedings, mandatory or otherwise.' § 21 (b). The question in the instant case is not whether the deputy commissioner has acted improperly or arbitrarily as shown by the record of his proceedings in the course of administration in cases contemplated by the statute, but whether he has acted in a case to which the statute is inapplicable. By providing for injunction proceedings, the Congress evidently contemplated a suit as in equity, and in such a suit the complainant would have full opportunity to plead and prove either that the injury did not occur upon the navigable waters of the United States or that the relation of master and servant did not exist, and hence that the case lay outside the purview of the statute. As the question is one of the constitutional authority of the deputy commissioner as an administrative agency, the court is under no obligation to give weight to his proceedings pending the determination of that question. If the court finds that the facts existed which gave the deputy commissioner jurisdiction to pass upon the claim for compensation, the injunction will be denied in so far as these fundamental questions are concerned; if, on the contrary, the court is satisfied that the deputy commissioner had no jurisdiction of the proceedings before him, that de-

termination will deprive them of their effectiveness for any purpose. We think that the essential independence of the exercise of the judicial power of the United States in the enforcement of constitutional rights requires that the Federal court should determine such an issue upon its own record and the facts elicited before it." (Mr. Chief Justice Hughes in *Crowell v. Benson* (1932) 285 U. S. 22, 63, 64, 76 L. Ed. 598, 52 S. Ct. 285.)

See § 745 et seq.

³ *United States v. Louisville & N. R. Co.* (1914) 235 U. S. 314, 59 L. Ed. 245, 35 S. Ct. 113.

⁴ *Missouri, K. & T. R. Co. v. Oklahoma* (1926) 271 U. S. 303, 70 L. Ed. 957, 46 S. Ct. 517. See also § 271.

⁵ *United States v. Louisville & N. R. Co.* (1914) 235 U. S. 314, 59 L. Ed. 245, 35 S. Ct. 113. See also § 274 et seq.

⁶ *United States ex rel. Milwaukee Social Democratic Pub. Co. v. Burleson* (1921) 255 U. S. 407, 65 L. Ed. 704, 41 S. Ct. 352. See also § 422.

⁷ *United States ex rel. Milwaukee Social Democratic Pub. Co. v. Burleson* (1921) 255 U. S. 407, 65 L. Ed. 704, 41 S. Ct. 352. See also § 422.

⁸ *Missouri, K. & T. R. Co. v. Oklahoma* (1926) 271 U. S. 303, 70 L. Ed. 957, 46 S. Ct. 517; *Ft. Smith Spelter Co. v. Clear Creek Oil & Gas Co.* (1925) 267 U. S. 231, 69 L. Ed. 588, 45 S. Ct. 263. See also § 421.

⁹ *Consolidated Edison Co. v. National Labor Relations Board* (1938) 305 U. S. 197, 83 L. Ed. 126, 59 S. Ct. 206; *Railroad Commission of Loui-*

or affected to an illegal extent,¹⁰ whether the constitutional power of Congress has been exceeded,¹¹ whether a person is in military service to become subject to the power of the executive over military affairs,¹² whether a party has been deprived of the equal protection of the laws, as by administrative discrimination,¹³ and any other question of constitutional right or power, regardless of how the question arises.¹⁴ The court may, in proceedings to set aside an order as not in accordance with law, make its own examination and determination of facts whenever that is deemed necessary to enforce a constitutional right properly asserted.¹⁵

§ 263. Constitutional Basis for the Rule.

When the legislature acts directly, its action is subject to judicial scrutiny and determination in order to prevent the transgression of the constitutional limitations on legislative power.¹⁶ The legislature cannot preclude that scrutiny and determination by any declaration or legislative finding,¹⁷ and no statute can limit the *de novo* trial of a constitutional question.¹⁸ A legislative declaration or finding is necessarily subject to independent judicial review upon the facts and the law by courts of competent jurisdiction to the end that the Constitution as the supreme law of the land may be maintained.¹⁹ Nor can the legislature escape the constitutional limitations on its power by authorizing an administrative agent to make findings that the agent has kept within that limitation.²⁰ As the Congress itself could not be, so it cannot make its agents be, the final judge of its own power under the Constitution.²¹ Congress has no power to make a final de-

siana v. Texas & P. R. Co. (1913) 229 U. S. 336, 57 L. Ed. 1215, 33 S. Ct. 837. See also § 420.

¹⁰ *St. Louis-San Francisco R. Co. v. Public Service Commission* (1923) 261 U. S. 369, 67 L. Ed. 701, 43 S. Ct. 380; *Yazoo & M. V. R. Co. v. Greenwood Grocery Co.* (1913) 227 U. S. 1, 57 L. Ed. 389, 33 S. Ct. 213.

¹¹ See § 265.

¹² See § 267.

¹³ See § 401.

¹⁴ See *St. Joseph Stock Yards Co. v. United States* (1936) 298 U. S. 38, 80 L. Ed. 1033, 59 S. Ct. 720.

¹⁵ *Crowell v. Benson* (1932) 285 U. S. 22, 76 L. Ed. 593, 52 S. Ct. 285.

¹⁶ *St. Joseph Stock Yards Co. v.*

United States (1936) 298 U. S. 38, 80 L. Ed. 1033, 59 S. Ct. 720.

¹⁷ *St. Joseph Stock Yards Co. v. United States* (1936) 298 U. S. 38, 80 L. Ed. 1033, 59 S. Ct. 720.

¹⁸ *Baltimore & O. R. Co. v. United States* (1936) 298 U. S. 349, 80 L. Ed. 1209, 56 S. Ct. 797.

¹⁹ *St. Joseph Stock Yards Co. v. United States* (1936) 298 U. S. 38, 80 L. Ed. 1033, 59 S. Ct. 720.

²⁰ *St. Joseph Stock Yards Co. v. United States* (1936) 298 U. S. 38, 80 L. Ed. 1033, 59 S. Ct. 720.

²¹ *Baltimore & O. R. Co. v. United States* (1936) 298 U. S. 349, 80 L. Ed. 1209, 56 S. Ct. 797.

termination of just compensation or to prescribe what constitutes due process of law for its ascertainment.²² Therefore to say that administrative findings of fact may be made conclusive where constitutional rights of liberty and property are involved, although the evidence clearly establishes that the findings are wrong and constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards.²³ The judicial power of a competent court cannot be circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority.²⁴ Thus whenever a party asserts that an adminis-

²² *Baltimore & O. R. Co. v. United States* (1936) 298 U. S. 349, 80 L. Ed. 1209, 56 S. Ct. 797.

²³ *St. Joseph Stock Yards Co. v. United States* (1936) 298 U. S. 38, 80 L. Ed. 1033, 59 S. Ct. 720.

"In relation to these basic facts, the question is not the ordinary one as to the propriety of provision for administrative determinations. Nor have we simply the question of due process in relation to notice and hearing. It is rather a question of the appropriate maintenance of the Federal judicial power in requiring the observance of constitutional restrictions. It is the question whether the Congress may substitute for constitutional courts, in which the judicial power of the United States is vested, an administrative agency—in this instance a single deputy commissioner—for the final determination of the existence of the facts upon which the enforcement of the constitutional rights of the citizen depend. The recognition of the utility and convenience of administrative agencies for the investigation and finding of facts within their proper province, and the support of their authorized action, does not require the conclusion that there is no limitation of their use, and that the Congress could completely oust the courts of all determinations of fact by vesting the

authority to make them with finality in its own instrumentalities or in the Executive Department. That would be to sap the judicial power as it exists under the Federal Constitution, and to establish a government of a bureaucratic character alien to our system, wherever fundamental rights depend, as not infrequently they do depend, upon the facts, and finality as to facts becomes in effect finality in law." (Mr. Chief Justice Hughes in *Crowell v. Benson* (1932) 285 U. S. 22, 56, 57, 76 L. Ed. 598, 52 S. Ct. 285.)

²⁴ "The fixing of rates is a legislative act. In determining the scope of judicial review of that act, there is a distinction between action within the sphere of legislative authority and action which transcends the limits of legislative power. Exercising its rate-making authority, the legislature has a broad discretion. It may exercise that authority directly, or through the agency it creates or appoints to act for that purpose in accordance with appropriate standards. The court does not sit as a board of revision to substitute its judgment for that of the legislature or its agents as to matters within the province of either. *San Diego Land & Town Co. v. Jasper*, 189 U. S. 439, 446; *Minnesota Rate Cases*, 230 U. S. 352, 433; *Los Angeles Gas Corp. v.*

trative determination, if made effective, will deprive him of a constitutional right, he is entitled to have the constitutional question, but that question only, tried *de novo* in the reviewing court, so that an independent judicial determination of the constitutional question may be had. There is nothing new or strange in this. It has always

Railroad Commission, 289 U. S. 287, 304. When the legislature itself acts within the broad field of legislative discretion, its determinations are conclusive. When the legislature appoints an agent to act within that sphere of legislative authority, it may endow the agent with power to make findings of fact which are conclusive, provided the requirements of due process which are specially applicable to such an agency are met, as in according a fair hearing and acting upon evidence and not arbitrarily. *Interstate Commerce Comm'n v. Louisville & Nashville R. Co.*, 227 U. S. 88, 91; *Virginian Ry. Co. v. United States*, 272 U. S. 658, 663; *Tagg Bros. & Moorhead v. United States*, *supra*, p. 444; *Florida v. United States*, 292 U. S. 1, 12. In such cases, the judicial inquiry into the facts goes no further than to ascertain whether there is evidence to support the findings, and the question of the weight of the evidence in determining issues of fact lies with the legislative agency acting within its statutory authority.

"But the Constitution fixes limits to the rate-making power by prohibiting the deprivation of property without due process of law or the taking of private property for public use without just compensation. When the legislature acts directly, its action is subject to judicial scrutiny and determination in order to prevent the transgression of these limits of power. The legislature cannot preclude that scrutiny and determination by any declaration or legislative finding. Legislative declaration or finding is necessarily subject to independent judi-

cial review upon the facts and the law by courts of competent jurisdiction to the end that the Constitution as the supreme law of the land may be maintained. Nor can the legislature escape the constitutional limitation by authorizing its agent to make findings that the agent has kept within that limitation. Legislative agencies, with varying qualifications, work in a field peculiarly exposed to political demands. Some may be expert and impartial, others subservient. It is not difficult for them to observe the requirements of law in giving a hearing and receiving evidence. But to say that their findings of fact may be made conclusive where constitutional rights of liberty and property are involved, although the evidence clearly establishes that the findings are wrong and constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards. That prospect, with our multiplication of administrative agencies, is not one to be lightly regarded. It is said that we can retain judicial authority to examine the weight of evidence when the question concerns the right of personal liberty. But if this be so, it is not because we are privileged to perform our judicial duty in that case and for reasons of convenience to disregard it in others. The principle applies when rights either of person or of property are protected by constitutional restrictions. Under our system there is no warrant for the view that the judicial power of a competent court can

been a part of the judicial function to determine whether the act of one party, whether that party be a single individual, an organized body, or the public as a whole, operates to divest the other party of rights of person or property.²⁵ The rule is bottomed on the due process clause as well as Article III of the Constitution.²⁶

And the Supreme Court has also adverted to the difference in security of judicial over administrative action in upholding the guarantee of due process in the Fifth Amendment.²⁷

§ 264. Extent of the Right.

The right to a trial *de novo* on judicial review exists only on questions of constitutional right and power.²⁸ Where the right is available it is confined to the particular constitutional question involved, and does not extend to other issues in the case except in so far as they are relevant to the constitutional question.²⁹ Thus the claim that the constitutional right of full hearing has been denied, as by failure to

be circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority. This is the purport of the decisions above cited with respect to the exercise of an independent judicial judgment upon the facts where confiscation is alleged. The question under the Packers and Stockyards Act is not different from that arising under any other act, and we see no reason why those decisions should be overruled." (Mr. Chief Justice Hughes in *St. Joseph Stock Yards Co. v. United States* (1936) 298 U. S. 38, 50-52, 80 L. Ed. 1033, 59 S. Ct. 720.)

²⁵ *Baltimore & O. R. Co. v. United States* (1936) 298 U. S. 349, 80 L. Ed. 1209, 56 S. Ct. 979; see *Mississippi Railroad Commission v. Mobile & O. R. Co.* (1917) 244 U. S. 388, 61 L. Ed. 1216, 37 S. Ct. 602.

²⁶ *Crowell v. Benson* (1932) 285 U. S. 22, 76 L. Ed. 598, 52 S. Ct. 285.

²⁷ *Ng Fung Ho v. White* (1922) 259 U. S. 276, 66 L. Ed. 938, 42 S. Ct. 492; *White v. Chin Fong* (1920) 253 U. S. 90, 64 L. Ed. 797, 40 S. Ct. 449.

²⁸ Alien Cases.

Kessler v. Strecker (1939) 307 U. S. 22, 83 L. Ed. 1082, 59 S. Ct. 694; *Ng Fung Ho v. White* (1922) 259 U. S. 276, 66 L. Ed. 938, 42 S. Ct. 492. But see *United States v. Ju Toy* (1905) 198 U. S. 253, 49 L. Ed. 1040, 25 S. Ct. 644, which is probably no longer the law.

Interstate Commerce Commission.

Shields v. Utah Idaho C. R. Co. (1938) 305 U. S. 177, 83 L. Ed. 111, 59 S. Ct. 160.

National Labor Relations Board.

Washington, Va. & Md. Coach Co. v. National Labor Relations Board (1937) 301 U. S. 142, 81 L. Ed. 965, 57 S. Ct. 648.

Secretary of Agriculture.

St. Joseph Stock Yards Co. v. United States (1936) 298 U. S. 38, 80 L. Ed. 1033, 59 S. Ct. 720; *Tagg Bros. & Moorhead v. United States* (1930) 280 U. S. 420, 74 L. Ed. 524, 50 S. Ct. 220; *Denver Union Stock Yard Co. v. United States* (D. C. Colo. 1932) 57 F. (2d) 735.

²⁹ *Tagg Bros. & Moorhead v. United States* (1930) 280 U. S. 420, 74 L. Ed. 524, 50 S. Ct. 220.

give proper notice,³⁰ will not open the door for a trial *de novo* as to the reasonableness of rates fixed by the agency. If there has been notice the administrative determinations are valid; if not, the case must be sent back for a new hearing.³¹

There is no right to a trial *de novo* even upon a constitutional question, unless the pleadings on review show that the party complaining of administrative action has a triable issue.³² The mere claim that a constitutional right has been invaded, without any apparent basis in fact, however, is not enough to entitle one to a trial *de novo*. A bald claim to that effect presents no justiciable issue to be tried.³³ Thus, while there is a right to trial *de novo* when a claim of citizenship is made and supported by substantial evidence in a deportation proceeding, a statute³⁴ which makes the determination of the Board of Special Inquiry, if approved by the Secretary of Labor, conclusive upon the question, does not deny due process to an alien who had never resided in the United States and who merely made a claim of citizenship, without more.³⁵

A party may not claim on appeal that he was entitled below to a trial *de novo* and to the consideration of evidence outside the administrative record, where he made no offer to introduce such evidence.³⁶ Trial *de novo* may not be had on review which is legislative, not judicial in character, even though confiscation is asserted.³⁷ Nor may it be had where a particular mode of judicial review raises only questions of state law.³⁸ Thus where state procedure provides for two modes of judicial review, (1) certiorari on questions of state law without trial *de novo*, and (2) suit in equity with trial *de novo*, a party alleging confiscation who pursues the remedy of certiorari is not entitled to trial *de novo*, even though he alleges denial of federal

³⁰ See § 290.

³¹ Tagg Bros. & Moorhead v. United States (1930) 280 U. S. 420, 74 L. Ed. 524, 50 S. Ct. 220. See also § 788 et seq.

³² See Quon Quon Poy v. Johnson (1927) 273 U. S. 352, 71 L. Ed. 680, 47 S. Ct. 346. See also §§ 269, 727 et seq.

³³ Quon Quon Poy v. Johnson (1927) 273 U. S. 352, 71 L. Ed. 680, 47 S. Ct. 346.

³⁴ E. g., the Immigration Act of 1917, 8 USCA 173 et seq.

³⁵ Quon Quon Poy v. Johnson (1927) 273 U. S. 352, 71 L. Ed. 680, 47 S. Ct. 346.

³⁶ Acker v. United States (1936) 298 U. S. 426, 80 L. Ed. 1257, 56 S. Ct. 824, rehearing denied 298 U. S. 692, 80 L. Ed. 1409, 56 S. Ct. 951.

³⁷ Southwestern Bell Telephone Co. v. Oklahoma (1938) 303 U. S. 206, 82 L. Ed. 751, 58 S. Ct. 528. See also § 45 et seq.

³⁸ New York ex rel. Consolidated Water Co. v. Maltbie (1938) 303 U. S. 158, 82 L. Ed. 724, 58 S. Ct. 506.

due process.³⁹ As review by certiorari raises only questions of state law no federal question is presented and no appeal lies to the United States Supreme Court from the decision of the highest state court.⁴⁰

District courts may set aside a confiscatory rate but are without authority to prescribe rates.⁴¹

§ 265. Questions of Constitutional Jurisdiction and Power.

Questions as to the constitutional power of Congress and its administrative agent to act in respect of certain subject matter depend always upon facts. If these facts exist, so does the jurisdiction and power of Congress and its agent. But if the facts are not present, neither Congress nor its agent have power to act. For instance, whether the relationship of master and servant exists is a mixed question of law and fact in compensation cases. It is a determination of fact, and that fact is the pivot of the statute and underlies the

³⁹ *New York ex rel. Consolidated Water Co. v. Maltbie* (1938) 303 U. S. 158, 82 L. Ed. 724, 58 S. Ct. 506.

⁴⁰ "1. Appellant contends that it is entitled to the exercise of the independent judgment of a court as to the law and the facts with respect to the issue of confiscation and that such a review has not been accorded because of the limitations imposed by the state practice in certiorari proceedings. 275 N. Y. at p. 370; 9 N. E. 2d 961. Appellant has no standing to raise this question as appellant itself sought review by certiorari and has not invoked the plenary jurisdiction of a court of equity and it does not appear that this remedy is not available under the state law. *Matter of Pennsylvania Gas Co. v. Public Service Comm'n*, 211 App. Div. 253, 256; 207 N. Y. S. 599; *Matter of New Rochelle Water Co. v. Maltbie*, 248 App. Div. 66, 70; 239 N. Y. S. 388."

"2. Upon the review of the Commission's order by certiorari, only questions of law were open under the state practice, including the question whether there was evidence to sus-

tain the findings of the Commission. 275 N. Y. at p. 366; 9 N. E. 2d 961. In that view no substantial federal question is presented. *Cedar Rapids Gas Co. v. Cedar Rapids*, 223 U. S. 655, 668-670; *Interstate Commerce Comm'n v. Louisville & Nashville R. Co.*, 227 U. S. 88, 91, 92; *New York ex rel. New York & Queens Gas Co. v. McCall*, 219 N. Y. 84, 88-90; 245 U. S. 345, 348, 349. The motion to dismiss is granted." (Per Curiam, *New York ex rel. Consolidated Water Co. v. Maltbie* (1938) 303 U. S. 158, 159, 160, 82 L. Ed. 724, 58 S. Ct. 506.)

⁴¹ "District courts may set aside a confiscatory rate prescribed by state authority because forbidden by the Fourteenth Amendment, but they are without authority to prescribe rates, both because that is a function reserved to the state, and because it is not one within the judicial power conferred upon them by the Constitution." (Mr. Justice Stone in *Central Kentucky Natural Gas Co. v. Railroad Commission of Kentucky* (1933) 290 U. S. 264, 271, 78 L. Ed. 307, 54 S. Ct. 154.)

constitutionality of the enactment.⁴² Hence, as questions of constitutional jurisdiction and power are for the courts, the facts upon which the questions must be decided are inherently for the courts, even though an administrative agency may have made an initial determination, not binding on the court, as to the facts. This line of cases have become known as "jurisdictional fact" cases. Such a label is confusing because it does not emphasize adequately that the type of question is one of the fundamental law going to the limits of the power of Congress itself.

§ 266. — Compensation Cases: Constitutional Jurisdiction and Power of Congress to Impose Liability Without Fault.

In admiralty compensation cases certain determinations of fact are fundamental or "jurisdictional" in the sense that their existence is a condition precedent to the operation of the statutory scheme. They are for the independent determination of the court in a trial *de novo*.⁴³ First the injury must occur upon the navigable waters of the United States, or else it is outside the admiralty and maritime jurisdiction of Congress.⁴⁴ Second the relation of master and servant must exist. Congress has no general power to amend the maritime law so as to establish liability without fault in maritime cases regardless of particular circumstances or relations. While it is unnecessary to consider what circumstances or relations might permit this, some suitable selection is required, such as the master-servant relation. When Congress does this, the fact of that relation is the pivot of the statute, and, in the absence of other justification, underlies the constitutionality of the enactment.⁴⁵

⁴² *Crowell v. Benson* (1932) 285 U. S. 22, 76 L. Ed. 598, 52 S. Ct. 285.

⁴³ *Crowell v. Benson* (1932) 285 U. S. 22, 76 L. Ed. 598, 52 S. Ct. 285.

⁴⁴ *Crowell v. Benson* (1932) 285 U. S. 22, 76 L. Ed. 598, 52 S. Ct. 285.

⁴⁵ "A different question is presented where the determinations of fact are fundamental or 'jurisdictional,' in the sense that their existence is a condition precedent to the operation of the statutory scheme. These fundamental requirements are that the injury occur upon the navigable waters of the United States and that the relation of master and servant exist.

These conditions are indispensable to the application of the statute, not only because the Congress has so provided explicitly (§ 3), but also because the power of the Congress to enact the legislation turns upon the existence of these conditions.

"In amending and revising the maritime law, the Congress cannot reach beyond the constitutional limits which are inherent in the admiralty and maritime jurisdiction. Unless the injuries to which the Act relates occur upon the navigable waters of the United States, they fall outside that jurisdiction. Not only is navigability

§ 267. — Military Cases: Constitutional Jurisdiction of Officer: Allegation of No Enlistment.

Even where the subject lies within the general authority of Congress, jurisdictional determinations of fact are tried *de novo* since they underly the authority of executive officers. Thus in proceedings against a person under military law, when enlistment is denied, that issue is determined *de novo* upon *habeas corpus*.⁴⁶ But where a person is in the military service, so that jurisdiction exists, it is settled beyond controversy that decisions by military tribunals, constituted by act of Congress, cannot be reviewed or set aside by civil courts in a mandamus proceeding or otherwise.⁴⁷ Otherwise the civil courts

itself a question of fact, as waters that are navigable in fact are navigable in law, but, where navigability is not in dispute, the locality of the injury, that is, whether it has occurred upon the navigable waters of the United States, determines the existence of the congressional power to create the liability prescribed by the statute. Again, it cannot be maintained that the Congress has any general authority to amend the maritime law so as to establish liability without fault in maritime cases regardless of particular circumstances or relations. It is unnecessary to consider what circumstances or relations might permit the imposition of such a liability by amendment of the maritime law, but it is manifest that some suitable selection would be required. In the present instance, the Congress has imposed liability without fault only where the relation of master and servant exist in maritime employment and, while we hold that the Congress could do this, the fact of that relation is the pivot of the statute and, in the absence of any other justification, underlies the constitutionality of this enactment. If the person injured was not an employee of the person sought to be held, or if the injury did not occur upon the navigable waters of the United States, there is no

ground for an assertion that the person against whom the proceeding was directed could constitutionally be subjected, in the absence of fault upon his part, to the liability which the statute creates." (Mr. Chief Justice Hughes in *Crowell v. Benson* (1932) 285 U. S. 22, 54-56, 76 L. Ed. 598, 52 S. Ct. 235.)

See John Dickinson in "Crowell v. Benson: Judicial Review of Administrative Determination of 'Constitutional Fact'" (1932) 80 Univ. of Pa. L. Rev. 1055. The rule allowing trial *de novo* on constitutional questions was criticized by Mr. Dickinson shortly after that decision on the ground that constitutional questions could be raised in any case by a skillful pleader, with the result of crowding the courts with litigation requiring a trial *de novo*. This does not appear to have proven to be the case. See Forrest R. Black in "The 'Jurisdictional Fact' Theory and Administrative Finality," (1937) 22 Cornell L. Quar. 349, 515.

⁴⁶ *Crowell v. Benson* (1932) 285 U. S. 22, 76 L. Ed. 598, 52 S. Ct. 235; *Ng Fung Ho v. White* (1922) 259 U. S. 276, 66 L. Ed. 938, 42 S. Ct. 492; *In re *Grimley* (1890) 137 U. S. 147, 34 L. Ed. 636, 11 S. Ct. 54.

⁴⁷ *United States ex rel. French v. Weeks* (1922) 259 U. S. 326, 66 L. Ed. 965, 42 S. Ct. 505; *United States ex*

would virtually administer the rules and articles of war, irrespective of those given the duty by law, from whose decisions no appeal or jurisdiction of any kind has been given to the civil magistrate or civil courts.⁴⁸ The power given Congress by the Constitution to raise and equip armies and to make regulations for the government of the land and naval forces of the country⁴⁹ is as plenary and specific as that given for the organization and conduct of civil affairs. Experience proves that a much more expeditious procedure is necessary in military than is thought tolerable in civil affairs.⁵⁰ To those in the military or naval service, the military law is due process, and the civil courts cannot interfere, even though only one of four military tribunals acting upon a case gives an opportunity to be heard, provided Congress granted a hearing only before that tribunal.⁵¹ It is difficult to imagine any process of government more distinctly administrative in its nature and less adapted to be dealt with by the processes of civil courts than, for example, the classification and reduction in number of officers of the Army.⁵² And once jurisdiction attaches because of military status, it is retained while a person remains a military prisoner, even if he ceases to be a soldier, as by being dishonorably discharged.⁵³

§ 268. — Public Lands Cases: Constitutional Jurisdiction of Agency: Existence of Subject.

While, in the administration of the public land system, questions of fact are for the determination of the Land Department and its decision upon them conclusive, it is equally true that if lands never were public property, or have previously been disposed of, or if Congress has made no provision for their sale, or has reserved them, the department has no jurisdiction to transfer them. Such matters are for court decision, since the objection to the patent reaches beyond the action of the agency and goes to the existence of the subject

rel. *Creary v. Weeks* (1922) 259 U. S. 336, 66 L. Ed. 973, 42 S. Ct. 509.

⁴⁸ *United States ex rel. French v. Weeks* (1922) 259 U. S. 326, 66 L. Ed. 965, 42 S. Ct. 505.

⁴⁹ Art. I, § 8.

⁵⁰ *United States ex rel. Creary v. Weeks* (1922) 259 U. S. 336, 66 L. Ed. 973, 42 S. Ct. 509.

⁵¹ *United States ex rel. French v.*

Weeks (1922) 259 U. S. 326, 66 L. Ed. 965, 42 S. Ct. 505; *United States ex rel. Creary v. Weeks* (1922) 259 U. S. 336, 66 L. Ed. 973, 42 S. Ct. 509.

⁵² *United States ex rel. Creary v. Weeks* (1922) 259 U. S. 336, 66 L. Ed. 973, 42 S. Ct. 509.

⁵³ *Kahn v. Anderson* (1921) 255 U. S. 1, 65 L. Ed. 469, 41 S. Ct. 224.

upon which it was competent to act. In such a case, the invalidity of the patent may be shown in a separate proceeding.⁵⁴

Likewise whether Congress has power to convey lands may hang upon whether particular land in question is upland rather than tideland. Hence, in issuing a patent from the General Land Office in the Department of the Interior, an administrative determination that particular land is upland is not conclusive under the doctrine of administrative finality. As the question is one of jurisdiction, that is, of the very power of the Department to act upon the subject matter, it is always for judicial determination.⁵⁵

§ 269. — Citizenship Cases.

In deportation cases, for example, if an alleged alien asserts his citizenship in the departmental hearing, and supports his claim by substantial evidence, he is entitled to a trial *de novo* of that issue in the district court.⁵⁶ A claim of citizenship is the denial of an essential

⁵⁴ Crowell v. Benson (1932) 285 U. S. 22, 76 L. Ed. 598, 52 S. Ct. 285. See Noble v. Union River Logging R. Co. (1893) 147 U. S. 165, 37 L. Ed. 123, 13 S. Ct. 271.

⁵⁵ Borax Consolidated, Ltd. v. Los Angeles (1935) 296 U. S. 10, 80 L. Ed. 9, 56 S. Ct. 23, rehearing denied 296 U. S. 664, 80 L. Ed. 473, 56 S. Ct. 304.

⁵⁶ Kessler v. Strecker (1939) 307 U. S. 22, 83 L. Ed. 1082, 59 S. Ct. 694; United States ex rel. Bilokumsky v. Tod (1923) 263 U. S. 149, 68 L. Ed. 221, 44 S. Ct. 54; Ng Fung Ho v. White (1922) 259 U. S. 276, 66 L. Ed. 938, 42 S. Ct. 492; Wong Hai Sing v. Nagle (C. C. A. 9th, 1931) 47 F. (2d) 1021; In re Wong Tung Fook (D. C. D. Mass., 1930) 40 F. (2d) 741, aff'd (C. C. A. 1st, 1930) 45 F. (2d) 156; Lew Shee v. Nagle (C. C. A. 9th, 1925) 7 F. (2d) 367; Soo Hoo Yee v. United States (C. C. A. 2d, 1924) 3 F. (2d) 592. See Flynn ex rel. Lum Hand v. Tillinghast (C. C. A. 1st, 1932) 62 F. (2d) 308; United States ex rel. Gonzalez v. Kirk (D. C. S. D. Tex., 1930) 39 F. (2d) 246; United States v. International Freighting Corp., Inc. (D.

C. S. D. N. Y. 1937) 20 F. Supp. 357.

"The Circuit Court of Appeals remanded the cause to the District Court for a trial *de novo*. In this we think there was error. The proceeding for deportation is administrative. If the hearing was fair, if there was evidence to support the finding of the Secretary, and if no error of law was committed, the ruling of the Department must stand and cannot be corrected in judicial proceedings. If, on the other hand, one of the elements mentioned is lacking, the proceeding is void and must be set aside. A district court cannot upon *habeas corpus*, proceed *de novo*, for the function of investigation and finding has not been conferred upon it but upon the Secretary of Labor. Only in the event an alleged alien asserts his United States citizenship in the hearing before the Department, and supports his claim by substantial evidence, is he entitled to a trial *de novo* of that issue in the district court. The status of the relator must be judicially determined, because jurisdiction in the executive to order deportation exists only if

jurisdictional fact as to the power of Congress and the Secretary of Labor to deport.⁵⁷ His status must be judicially determined on petition for a writ of *habeas corpus* because jurisdiction in the executive to order deportation exists only if the person arrested is an alien, and no statutory proceeding is provided in which he can raise the question whether the executive action is in excess of the jurisdiction conferred upon the Secretary of Labor. Otherwise it would violate the Fifth Amendment by depriving the citizen of liberty, and perhaps property or life, without due process of law.⁵⁸ In upholding the guarantee of the Amendment judicial action offers greater security than administrative action.⁵⁹

But when a petitioner, who has never resided in the United States, presents himself at its border for admission, the mere fact that he claims to be a citizen does not entitle him under the Constitution to a judicial hearing.⁶⁰ And, in the absence of a claim of citizenship supported by substantial evidence, where a statute⁶¹ makes the determination of a Board of Special Inquiry, when approved by the Secretary of Labor, final upon the question of citizenship, it is the duty of the court to dismiss the writ of *habeas corpus* without proceeding further,⁶² unless it appears that the departmental officers to

the person arrested is an alien; and no statutory proceeding is provided in which he can raise the question whether the executive action is in excess of the jurisdiction conferred upon the Secretary." (Mr. Justice Roberts in *Kessler v. Strecker* (1939) 307 U. S. 22, 34, 35, 83 L. Ed. 1082, 59 S. Ct. 694.)

⁵⁷ "Jurisdiction in the executive to order deportation exists only if the person arrested is an alien. The claim of citizenship is thus a denial of an essential jurisdictional fact. The situation bears some resemblance to that which arises where one against whom proceedings are being taken under the military law denies that he is in the military service. It is well settled that in such a case a writ of *habeas corpus* will issue to determine the status." (Mr. Justice Brandeis in *Ng Fung Ho v. White* (1922) 259 U. S. 276, 284, 66 L. Ed. 938, 42 S. Ct. 492.)

⁵⁸ *Kessler v. Strecker* (1939) 307 U. S. 22, 83 L. Ed. 1082, 59 S. Ct. 694; *Crowell v. Benson* (1932) 285 U. S. 22, 76 L. Ed. 598, 52 S. Ct. 285; *Ng Fung Ho v. White* (1922) 259 U. S. 276, 66 L. Ed. 938, 42 S. Ct. 492.

⁵⁹ *Ng Fung Ho v. White* (1922) 259 U. S. 276, 66 L. Ed. 938, 42 S. Ct. 492; *White v. Chin Fong* (1920) 253 U. S. 90, 64 L. Ed. 797, 40 S. Ct. 449.

⁶⁰ *Quon Quon Poy v. Johnson* (1927) 273 U. S. 352, 71 L. Ed. 680, 47 S. Ct. 346; *Ng Fung Ho v. White* (1922) 259 U. S. 276, 66 L. Ed. 938, 42 S. Ct. 492; *United States v. Sing Tuck* (1904) 194 U. S. 161, 48 L. Ed. 917, 24 S. Ct. 621; *Chin Bak Kan v. United States* (1902) 186 U. S. 193, 46 L. Ed. 1121, 22 S. Ct. 891.

⁶¹ Immigration Act of 1917, 8 USCA 173 et seq.

⁶² *Quon Quon Poy v. Johnson* (1927) 273 U. S. 352, 71 L. Ed. 680, 47 S. Ct. 346.

whom Congress entrusted the decision of the alleged alien's claim had denied him an opportunity to establish his citizenship at a fair hearing, or acted in some unlawful or improper way, or abused their discretion.⁶³ Where no claim of citizenship is made, final questions of factual interpretation rest with the administrative officials.⁶⁴

§ 270. — Post-Office Cases: Constitutional Authority of the Postmaster-General: Nature of a Publication.

In a suit to restrain the Postmaster General from acting beyond his authority in excluding a publication from carriage as second-class matter, the question whether the publication is a "periodical" or a "book" has been tried *de novo*.⁶⁵

§ 270A. Questions of Constitutional Right.

§ 271. — Confiscation Cases: Due Process.

Confiscation is illustrative of the rule that in cases brought to enforce constitutional rights the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function.⁶⁶ And a state must clearly provide a fair opportunity for

⁶³ Quon Quon Poy v. Johnson (1927) 273 U. S. 352, 71 L. Ed. 680, 47 S. Ct. 346; Chin Yow v. United States (1908) 208 U. S. 8, 52 L. Ed. 369, 28 S. Ct. 201.

⁶⁴ Tod v. Waldman (1924) 266 U. S. 113, 69 L. Ed. 195, 45 S. Ct. 85; Wong Hai Sing v. Nagle (C. C. A. 9th, 1931) 47 F. (2d) 1021.

⁶⁵ Smith v. Hitchcock (1912) 226 U. S. 53, 57 L. Ed. 119, 33 S. Ct. 6.

⁶⁶ Secretary of Agriculture.

* St. Joseph Stock Yards Co. v. United States (1936) 298 U. S. 38, 80 L. Ed. 1033, 59 S. Ct. 720; * Denver Union Stock Yard Co. v. United States (D. C. Colo., 1932) 57 F. (2d) 735.

State Agencies.

United Gas Public Service Co. v. Texas (1938) 303 U. S. 123, 82 L. Ed. 702, 58 S. Ct. 483, rehearing denied 303 U. S. 667, 82 L. Ed. 1124, 58 S. Ct. —; West v. Chesapeake & Potomac Telephone Co. (1935) 295 U. S. 662,

79 L. Ed. 1640, 55 S. Ct. 894; Los Angeles Gas & Electric Corp. v. Railroad Commission of Cal. (1933) 289 U. S. 287, 77 L. Ed. 1180, 53 S. Ct. 637; Smith v. Illinois Bell Telephone Co. (1930) 282 U. S. 133, 75 L. Ed. 255, 51 S. Ct. 65; Lehigh Valley R. Co. v. Public Utility Commissioners (1928) 278 U. S. 24, 73 L. Ed. 161, 49 S. Ct. 69, 62 A. L. R. 805; Ohio Valley Water Co. v. Ben Avon Borough (1920) 253 U. S. 287, 64 L. Ed. 908, 40 S. Ct. 527; Wadley Southern R. Co. v. Georgia (1915) 235 U. S. 651, 59 L. Ed. 405, 35 S. Ct. 214; Louisville & N. R. Co. v. Garrett (1913) 231 U. S. 298, 58 L. Ed. 229, 34 S. Ct. 48; Knoxville v. Knoxville Water Co. (1909) 212 U. S. 1, 53 L. Ed. 371, 29 S. Ct. 148; Central Kentucky Natural Gas Co. v. Railroad Commission of Ky. (D. C. E. D. Ky. 1930) 37 F. (2d) 938. See Railroad Commission of Texas v. Rowan & Nichols Oil Co. (1940) 310

the independent judgment of a court upon the facts and the law when confiscation is alleged. Otherwise the order in question is void.⁶⁷ Constitutional rights may be as successfully and as seriously invaded by mistakes of fact as by mistakes of law, and when a citizen asserts that the rights guaranteed him by the Constitution have been invaded, the responsibility rests upon the courts to hear him and he cannot be denied a hearing on the ground that his claim rests upon a question of fact.⁶⁸

U. S. 573, 84 L. Ed. 1368, 60 S. Ct. 1021, opinion modified and rehearing denied 311 U. S. 614, 85 L. Ed. 390, 61 S. Ct. 66, rehearing again denied 311 U. S. 727, 85 L. Ed. 473, 61 S. Ct. 167; s. c. (1941) 311 U. S. 570, 85 L. Ed. 358, 61 S. Ct. 343.

Workmen's Compensation Cases.

See *Crowell v. Benson (1932) 285 U. S. 22, 76 L. Ed. 598, 52 S. Ct. 285. Quotations.

"4. We approach the decision of the particular questions thus presented in the light of the general principles this Court has frequently declared. We have emphasized the distinctive function of the Court. We do not sit as a board of revision, but to enforce constitutional rights. *San Diego Land & Town Co. v. Jasper*, 189 U. S. 439, 446. The legislative discretion implied in the rate making power necessarily extends to the entire legislative process, embracing the method used in reaching the legislative determination as well as that determination itself. We are not concerned with either, so long as constitutional limitations are not transgressed. When the legislative method is disclosed, it may have a definite bearing upon the validity of the result reached, but the judicial function does not go beyond the decision of the constitutional question. That question is whether the rates as fixed are confiscatory. And upon that question the complainant has the burden of proof and the Court may not interfere with the exercise of the State's authority unless confisca-

tion is clearly established." (Mr. Chief Justice Hughes in *Los Angeles Gas & Electric Corp. v. Railroad Commission of Cal.* (1933) 289 U. S. 287, 304, 305, 77 L. Ed. 1180, 53 S. Ct. 637.)

See "Judicial Review of Rate Orders of Administrative Boards: A Reexamination," (1936) 50 Harv. L. Rev. 78.

⁶⁷*Ohio Valley Water Co. v. Ben Avon Borough* (1920) 253 U. S. 287, 64 L. Ed. 908, 40 S. Ct. 527.

⁶⁸*Denver Union Stock Yard Co. v. United States* (D. C. Colo., 1932) 57 F. (2d) 735.

"Legislation cannot bolster itself up in that way. Litigation cannot arise until the moment of legislation is past. * * *

"But the determination as to their rights turns almost wholly upon the facts to be found. Whether the property was taken unconstitutionally depends upon the valuation of the property, the income to be derived from the proposed rate and the proportion between the two—pure matters of fact. When those are settled the law is tolerably plain. All their constitutional rights, we repeat, depend upon what the facts are found to be. They are not to be forbidden to try those facts before a court of their own choosing if otherwise competent." (Mr. Justice Holmes in *Prentiss v. Atlantic Coast Line Co.* (1908) 211 U. S. 210, 228, 53 L. Ed. 150, 29 S. Ct. 67.)

The principle has no less force where the administrative action assailed as taking the plaintiff's property without due process of law is action by the governor of a state in declaring martial law. The federal courts may inquire, in their independent judgment, if the facts show any military necessity, which from any point of view, could be taken to justify the action of a state governor in attempting to take the plaintiff's property.⁶⁹

§ 272. — Administrative Discrimination Cases: Equal Protection.

The principle applies equally to questions of denial of the equal protection of the laws. When a charge of systematic and intentional discrimination is made it can be tried fully and fairly only by a court that can hear any and all competent evidence, and that is not bound by findings of the implicated board for which there is any evidence, always easily produced.⁷⁰

§ 273. Interstate Commerce Cases.

Another question of constitutional power tried *de novo* is the question whether state administrative action regulates interstate commerce to an illegal extent. A state cannot regulate interstate commerce, but there are instances where it may affect commerce in the exercise of a necessary power, such as the requisition of reasonable facilities. Where such requisition is attacked as imposing an undue burden on interstate commerce the Supreme Court decides the "fact of local facilities," this decision being necessary to the court's power to consider whether the regulation of the state affected interstate commerce to an illegal extent.⁷¹ Thus state commission orders to carriers to stop trains at given points within a state may or may not be valid according to circumstances. The decision of the constitutional question rests upon the Supreme Court's determination of the question of fact.⁷²

⁶⁹ *Sterling v. Constantin* (1932) 287 U. S. 378, 77 L. Ed. 375, 53 S. Ct. 190. U. S. 369, 67 L. Ed. 701, 43 S. Ct. 380; *Mississippi Railroad Commission v.*

⁷⁰ *Chicago, St. P. M. & O. R. Co. v. Illinois Cent. R. Co.* (1906) 203 U. S. 335, 51 L. Ed. 209, 27 S. Ct. 90. *Osborne* (1924) 265 U. S. 14, 68 L. Ed. 878, 44 S. Ct. 431.

⁷¹ *St. Louis-San Francisco R. Co. v. Public Service Commission* (1923) 261 U. S. 369, 67 L. Ed. 701, 43 S. Ct. 380. ⁷² *St. Louis-San Francisco R. Co. v. Public Service Commission* (1923) 261 U. S. 369, 67 L. Ed. 701, 43 S. Ct. 380.

CHAPTER 21

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I. PROCEDURAL DUE PROCESS IN ADMINISTRATIVE PROCEEDINGS

A. *In General*

§ 274. General Aspects of Procedural Due Process.

The question whether procedural due process has been accorded, is whether an administrative agency in its procedure, as distinguished from the effect of its order upon one's substantive rights, has failed to satisfy the requirements of the Federal Constitution.¹ To satisfy the requirements of procedural due process administrative proceedings must be governed by the rudimentary requirements of fair play, the

¹ Railroad Commission of Cal. v. U. S. 388, 82 L. Ed. 319, 58 S. Ct. 334. Pacific Gas & Electric Co. (1938) 302

fundamental requirements of fairness which are the essence of due process in a proceeding of a judicial nature. Agencies must act in accordance with the cherished judicial tradition underlying the basic concepts of fair play.² Due process in such proceedings is afforded if substantially no less advantage than at the common law is provided an interested party.³

The due process clauses are concerned with the substance and not the form of procedure,⁴ and the Fourteenth Amendment does not guarantee to a citizen of a state any particular form or method of state procedure.⁵ Its requirements are satisfied if he has reasonable notice and reasonable opportunity to be heard and to present his claim of defense, due regard being had to the nature of the proceedings and character of the rights which may be affected by it.⁶ Interested parties should be afforded a fair hearing, and judgment must express a reasoned conclusion.⁷

Administrative agencies have no greater constitutional right to cut their adversary proceedings short at the expense of those concepts than the judiciary itself would have. The Supreme Court has cogently pointed out that the maintenance of proper standards by administrative agencies in the performance of their essential quasi-judicial function of making findings of fact through administrative proceedings is of the highest importance, and in no way cripples or embarrasses the exercise of the appropriate authority of the agencies.⁸

² *Morgan v. United States* (1938) 304 U. S. 1, 82 L. Ed. 1129, 58 S. Ct. 773, rehearing denied 304 U. S. 23, 81 L. Ed. 1135, 58 S. Ct. 999.

³ *National Labor Relations Board v. Biles Coleman Lumber Co.* (C. C. A. 9th, 1938) 98 F. (2d) 16.

⁴ *Morgan v. United States* (1938) 304 U. S. 1, 82 L. Ed. 1129, 58 S. Ct. 773, rehearing denied 304 U. S. 23, 82 L. Ed. 1135, 58 S. Ct. 999.

⁵ "It has been so often pointed out in the opinions of this Court that the Fourteenth Amendment is concerned with the substance and not with the forms of procedure, as to make unnecessary any extended discussion of the question here presented. The due process clause does not guarantee to a citizen of a State any particular form or method of state procedure.

Its requirements are satisfied if he has reasonable notice, and reasonable opportunity to be heard and to present his claim or defense, due regard being had to the nature of the proceedings and the character of the rights which may be affected by it." (Mr. Justice Stone in *Missouri ex rel. Hurwitz v. North* (1926) 271 U. S. 40, 42, 70 L. Ed. 818, 46 S. Ct. 384.)

⁶ *Missouri ex rel. Hurwitz v. North* (1926) 271 U. S. 40, 70 L. Ed. 818, 46 S. Ct. 384.

⁷ *Federal Communications Commission v. Pottsville Broadcasting Co.* (1940) 309 U. S. 134, 84 L. Ed. 656, 60 S. Ct. 437.

⁸ "The maintenance of proper standards on the part of administrative agencies in the performance of their quasi-judicial functions is of the

§ 275. Inapplicable to Direct Legislative Proceedings.

The legislature which may delegate the power to make factual determinations need not itself conduct quasi-judicial proceedings for that purpose. In theory, at least, the legislature acts upon adequate knowledge after full consideration and through members who represent the entire public.⁹ This presumption which attaches to legislative action is a presumption of fact, of the existence of factual conditions supporting the legislation. As such it is rebuttable.¹⁰

The proceedings of Congress are not of an adversary character and Congress may or may not make findings of fact. Findings of fact made by Congress are not binding upon the courts *per se*. Unlike those made by administrative agencies which are specific and directed against particular parties, congressional findings are of general application. And their validity with respect to a particular party may always be tested in the courts when the statute based upon them is assailed. Hence the requirements of procedural due process are not applicable to the legislative proceedings of Congress¹¹ or a state legislature.¹²

Since Congress is not bound by the rules of procedural due process, a subsequent ratification by Congress of an administrative order makes the order valid, even if it was invalid before such ratification, for lack of procedural due process.¹³ It follows therefore, that the absence of procedural due process in administrative proceedings leading to an order is irrelevant where a subsequent statute expressly

highest importance and in no way cripples or embarrasses the exercise of their appropriate authority. On the contrary, it is in their manifest interest. For, as we said at the outset, if these multiplying agencies deemed to be necessary in our complex society are to serve the purposes for which they are created and endowed with vast powers, they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play.' (Mr. Chief Justice Hughes in *Morgan v. United States* (1938) 304 U. S. 1, 22, 82 L. Ed. 1129, 58 S. Ct. 773, rehearing denied 304 U. S. 23, 82 L. Ed. 1135,

58 S. Ct. 999.)

⁹ *Southern R. Co. v. Virginia* (1933) 290 U. S. 190, 78 L. Ed. 260, 54 S. Ct. 148.

¹⁰ *Borden's Farm Products Co. v. Baldwin* (1934) 293 U. S. 194, 79 L. Ed. 281, 55 S. Ct. 187.

¹¹ See *Interstate Commerce Commission v. Louisville & N. R. Co.* (1913) 227 U. S. 88, 57 L. Ed. 431, 33 S. Ct. 185.

¹² *Southern R. Co. v. Virginia* (1933) 290 U. S. 190, 78 L. Ed. 260, 54 S. Ct. 148.

¹³ *United States v. H. P. Hood & Sons, Inc.* (D. C. D. Mass., 1939) 26 F. Supp. 672, *aff'd* 307 U. S. 588, 83 L. Ed. 1478, 59 S. Ct. 1019.

ratifies all prior administrative action.¹⁴ The enactment may then be directly assailed on judicial review as lacking a rational basis in fact.

§ 276. Administrative Proceedings Which Are Subject to the Requirements: Adversary Proceedings.

In order to determine an administrative question an agency must ordinarily conduct proceedings of an adversary character. The fact that a proceeding is technically an investigation instituted by the agency does not necessarily prevent its being adversary. Every proceeding is adversary, in substance, if it may result in an order in favor of one private party as against another.¹⁵ This definition necessarily includes within the meaning of "party" an administrative agency which is a litigant as well as adjudicator. Proceedings may be none the less adversary because they are instituted by the Federal Trade Commission, National Labor Relations Board, or Securities and Exchange Commission, Secretary of Agriculture, or other agency whose additional duty it is to decide the issues. Adversary proceedings are of a quasi-judicial nature¹⁶ and are governed by the constitutional requirements of procedural due process, which are ap-

¹⁴ *United States v. H. P. Hood & Sons, Inc.* (D. C. D. Mass., 1939) 26 F. Supp. 672, aff'd 307 U. S. 588, 83 L. Ed. 1478, 59 S. Ct. 1019.

¹⁵ *United States v. Abilene & S. R. Co.* (1924) 265 U. S. 274, 68 L. Ed. 1016, 44 S. Ct. 565.

"The answer that the proceeding before the Secretary was not of an adversary character, as it was not upon complaint but was initiated as a general inquiry, is futile. It has regard to the mere form of the proceeding and ignores realities. In all substantial respects, the Government acting through the Bureau of Animal Industry of the Department was prosecuting the proceeding against the owners of the market agencies. The proceeding had all the essential elements of contested litigation, with the Government and its counsel on the one side and the appellants and their counsel on the other. It is idle to

say that this was not a proceeding in reality against the appellants when the very existence of their agencies was put in jeopardy. Upon the rates for their services the owners depended for their livelihood, and the proceeding attacked them in a vital spot." (Mr. Chief Justice Hughes in *Morgan v. United States* (1938) 304 U. S. 1, 20, 82 L. Ed. 1129, 58 S. Ct. 773, rehearing denied 304 U. S. 23, 82 L. Ed. 1135, 58 S. Ct. 999.)

¹⁶ *Shields v. Utah Idaho C. R. Co.* (1938) 305 U. S. 177, 83 L. Ed. 111, 59 S. Ct. 160; **Morgan v. United States* (1938) 304 U. S. 1, 82 L. Ed. 1129, 58 S. Ct. 773, rehearing denied 304 U. S. 23, 82 L. Ed. 1135, 58 S. Ct. 999; *Humphrey v. United States* (1935) 295 U. S. 602, 79 L. Ed. 1611, 55 S. Ct. 869; *Southern R. Co. v. Virginia* (1933) 290 U. S. 190, 78 L. Ed. 260, 54 S. Ct. 148.

plicable to all adversary proceedings, judicial, legislative, or administrative, in order that adversary administrative proceedings may be made to accord with the cherished judicial tradition embodying the basic concepts of fair play.¹⁷

Whenever an agency is required to determine a question "after hearing," its mode or procedure in making the determination is quasi-judicial.¹⁸

§ 277. — Inherent Requisites of Quasi-Judicial Proceedings.

Administrative adversary proceedings must therefore be governed by the fundamental requirements of fairness which are the essence of due process in a proceeding of a judicial nature,¹⁹ and the administrative agency sitting to hear and determine sits in a quasi-judicial capacity.²⁰ These substantial requirements are those applicable to judicial proceedings.²¹

The fact that the duty to make findings of fact is delegated to an officer in the executive branch of the government in no way diminishes the requirements of procedural due process applicable to adversary proceedings conducted by that officer.²² Thus such duty is widely

¹⁷ See *Morgan v. United States* (1938) 304 U. S. 1, 82 L. Ed. 1129, 58 S. Ct. 773, rehearing denied 304 U. S. 23, 82 L. Ed. 1135, 58 S. Ct. 999.

¹⁸ *Shields v. Utah Idaho C. R. Co.* (1938) 305 U. S. 177, 83 L. Ed. 111, 59 S. Ct. 160; *The Chicago Junction Case* (1924) 264 U. S. 258, 68 L. Ed. 667, 44 S. Ct. 317.

¹⁹ *Interstate Commerce Commission*.

* *Interstate Commerce Commission v. Louisville & N. R. Co.* (1913) 227 U. S. 88, 57 L. Ed. 431, 33 S. Ct. 185. *National Labor Relations Board*.

Consolidated Edison Co. v. National Labor Relations Board (1938) 305 U. S. 197, 83 L. Ed. 126, 59 S. Ct. 206. *Secretary of Agriculture*.

* *Morgan v. United States* (1936) 298 U. S. 468, 80 L. Ed. 1288, 56 S. Ct. 906; s. c. (1938) 304 U. S. 1, 82 L. Ed. 1129, 58 S. Ct. 773, rehearing denied 304 U. S. 23, 82 L. Ed. 1135, 58 S. Ct. 999; * *St. Joseph Stock Yards Co. v. United States* (1936) 298 U. S. 38, 80 L. Ed. 1033, 59 S. Ct. 720.

State Agencies.

Southern R. Co. v. Virginia (1933) 290 U. S. 190, 78 L. Ed. 260, 54 S. Ct. 148; *Pacific Live Stock Co. v. Lewis* (1916) 241 U. S. 440, 60 L. Ed. 1084, 36 S. Ct. 637. See *Louisville & N. R. Co. v. Garrett* (1913) 231 U. S. 298, 58 L. Ed. 229, 34 S. Ct. 48; *Londoner v. Denver* (1908) 210 U. S. 373, 52 L. Ed. 1103, 28 S. Ct. 708.

²⁰ See *Van Valkenburgh, C. J.*, dissenting in *Morgan v. United States*, (D. C. W. D. Mo., W. Div., 1937) 23 F. Supp. 380, rev'd 304 U. S. 1, 82 L. Ed. 1129, 58 S. Ct. 773, rehearing denied 304 U. S. 23, 82 L. Ed. 1135, 58 S. Ct. 999.

²¹ *McDonald v. Mabey* (1917) 243 U. S. 90, 61 L. Ed. 608, 37 S. Ct. 343.

²² *Morgan v. United States* (1936) 298 U. S. 468, 80 L. Ed. 1288, 56 S. Ct. 906; s. c. (1938) 304 U. S. 1, 82 L. Ed. 1129, 58 S. Ct. 773, rehearing denied 304 U. S. 23, 82 L. Ed. 1135, 58 S. Ct. 999.

different from ordinary executive action of such officers as the Secretary of Agriculture²³ or the Secretary of Labor.²⁴ His responsibility in hearing and determining as a legislative agent is fundamentally different from his responsibility in signing a mere departmental order,²⁵ and is in no respect influenced by the fact that the administrative agent of the legislature is also an executive officer. His actions as a legislative agent remain governed by the requirements of procedural due process.²⁶ Adversary administrative proceedings which are subject to the requirements of procedural due process include pro-

²³ *Morgan v. United States* (1936) 298 U. S. 468, 80 L. Ed. 1288, 56 S. Ct. 906; s. c. (1938) 304 U. S. 1, 82 L. Ed. 1129, 58 S. Ct. 773, rehearing denied 304 U. S. 23, 82 L. Ed. 1135, 58 S. Ct. 999; *Tagg Bros. & Moorhead v. United States* (1930) 280 U. S. 420, 74 L. Ed. 524, 50 S. Ct. 220.

²⁴ *Kessler v. Strecker* (1939) 307 U. S. 22, 83 L. Ed. 1082, 59 S. Ct. 694.

²⁵ See *Van Valkenburgh, C. J.*, dissenting in *Morgan v. United States* (D. C. W. D. Mo., W. Div., 1937) 23 F. Supp. 380, rev'd 304 U. S. 1, 82 L. Ed. 1129, 58 S. Ct. 773, rehearing denied 304 U. S. 23, 82 L. Ed. 1135, 58 S. Ct. 999.

"There is thus no basis for the contention that the authority conferred by § 310 of the Packers and Stockyards Act is given to the Department of Agriculture, as a department in the administrative sense, so that one official may examine evidence, and another official who has not considered the evidence may make the findings and order. In such a view, it would be possible, for example, for one official to hear the evidence and argument and arrive at certain conclusions of fact, and another official who had not heard or considered either evidence or argument to overrule those conclusions and for reasons of policy to announce entirely different ones. It is no answer to say that the question for the court is whether the evidence supports the findings and the findings support the order. For the

weight ascribed by the law to the findings—their conclusiveness when made within the sphere of the authority conferred—rests upon the assumption that the officer who makes the findings has addressed himself to the evidence and upon that evidence has conscientiously reached the conclusions which he deems it to justify. That duty cannot be performed by one who has not considered evidence or argument. It is not an impersonal obligation. It is a duty akin to that of a judge. The one who decides must hear." (Mr. Chief Justice Hughes in *Morgan v. United States* (1936) 298 U. S. 468, 481, 80 L. Ed. 1288, 56 S. Ct. 906; s. c. (1938) 304 U. S. 1, 82 L. Ed. 1129, 58 S. Ct. 773, rehearing denied 304 U. S. 23, 82 L. Ed. 1135, 58 S. Ct. 999.

²⁶ *Southern R. Co. v. Virginia* (1933) 290 U. S. 190, 78 L. Ed. 260, 54 S. Ct. 148.

"The proceeding is not one of ordinary administration, conformable to the standards governing duties of a purely executive character. It is a proceeding looking to legislative action in the fixing of rates of market agencies. And, while the order is legislative and gives to the proceeding its distinctive character (*Louisville & Nashville R. Co. v. Garrett*, 231 U. S. 298, 307), it is a proceeding which by virtue of the authority conferred has special attributes. The Secretary, as the agent of Congress in making the rates, must make them in

ceedings to determine a claim against the United States,²⁷ and those where the resulting finding is the basis of the court's disposition of segregated funds, in the exercise of the court's equity power,²⁸ or is the basis of another agency's order, although the first agency makes no order affecting any party.²⁹ A certificate of the National Mediation Board as to the chosen representative of a group of employees, issued without notice to the employers concerned and on statements

accordance with the standards and under the limitations which Congress has prescribed. Congress has required the Secretary to determine, as a condition of his action, that the existing rates are or will be 'unjust, unreasonable, or discriminatory.' If and when he so finds, he may 'determine and prescribe' what shall be the just and reasonable rate, or the maximum or minimum rate, thereafter to be charged. That duty is widely different from ordinary executive action. It is a duty which carries with it fundamental procedural requirements. There must be a full hearing. There must be evidence adequate to support pertinent and necessary findings of fact. Nothing can be treated as evidence which is not introduced as such. *United States v. Abilene & Southern Ry. Co.*, supra. Facts and circumstances which ought to be considered must not be excluded. Facts and circumstances must not be considered which should not legally influence the conclusion. Findings based on the evidence must embrace the basic facts which are needed to sustain the order. *Interstate Commerce Comm'n v. Louisville & Nashville R. Co.*, supra; *Chicago Junction Case*, 264 U. S. 258, 263; *United States v. Abilene & Southern Ry. Co.*, supra; *Florida v. United States*, supra; *United States v. B. & O. R. Co.*, supra.

"A proceeding of this sort requiring the taking and weighing of evidence, determinations of fact based upon the consideration of the evidence,

and the making of an order supported by such findings, has a quality resembling that of a judicial proceeding. Hence it is frequently described as a proceeding of a *quasi-judicial* character. The requirement of a 'full hearing' has obvious reference to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts. The 'hearing' is designed to afford the safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusion uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action. The 'hearing' is the hearing of evidence and argument. If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given." (Mr. Chief Justice Hughes in *Morgan v. United States* (1936) 298 U. S. 468, 479-481, 80 L. Ed. 1288, 56 S. Ct. 906; s. c. (1938) 304 U. S. 1, 82 L. Ed. 1129, 58 S. Ct. 773, rehearing denied 304 U. S. 23, 82 L. Ed. 1135, 58 S. Ct. 999.)

²⁷ *Dismuke v. United States* (1936) 297 U. S. 167, 80 L. Ed. 561, 56 S. Ct. 400, rehearing denied 297 U. S. 728, 80 L. Ed. 1011, 56 S. Ct. 594.

²⁸ *United States v. Morgan* (1939) 307 U. S. 183, 83 L. Ed. 1211, 59 S. Ct. 795.

²⁹ *Shields v. Utah Idaho C. R. Co.* (1938) 305 U. S. 177, 83 L. Ed. 111, 59 S. Ct. 160.

made to it by one side only, is unlawful, not being based on such an investigation as the act provides for.³⁰

But the requirements of procedural due process do not apply to administrative proceedings which do not result in the making of findings which determine or define legal rights or prescribe duties. Such proceedings are not of an adversary character.³¹

§ 278. General Compliance with the Requirements.

There is no denial of due process where a state tax board is required to submit a preliminary estimate of valuation and give the taxpayer an opportunity to be heard upon it so that changes may be made before the valuation is declared effective, where it is required that all available evidence be considered, and that the method of calculation which will best bring about a fair valuation shall be adopted, and where there is no evidence of arbitrary action, fraud, or gross error in the system on which the valuation was made.³² A hearing held by the Third Assistant Postmaster General, preliminary to revocation of second-class mailing privileges by the Postmaster General, satisfies all the requirements of due process when the newspaper has due notice of the time and character of the hearing, and is represented at it by the president of the paper.³³

There is no deprivation of an assessed owner's property without due process of law, where a state law fails to provide for notice or hearing before a village council making a tax assessment, when the law affords and the owner accepts an opportunity to determine all questions of law and fact as to the validity, fairness and proper amount of the assessment, in two full hearings before two state courts.³⁴ In valuation cases procedural due process is said to be satisfied if the utility's evidence and argument were received and considered, the body or officer made findings as to value of the company's property which are supported by substantial evidence, and proper allowance is made for depreciation and rate of return.³⁵

³⁰ *Cole v. Atlanta Terminal Co. (D. C. N. D. Ga., Atlanta Div., 1936)* 15 F. Supp. 131. *son (1921)* 255 U. S. 407, 65 L. Ed. 704, 41 S. Ct. 352.

³¹ *Isbrandtsen-Moller Co., Inc. v. United States (1937)* 300 U. S. 139, 81 L. Ed. 562, 57 S. Ct. 407. ³⁴ *Hetrick v. Lindsey (1924)* 265 U. S. 384, 68 L. Ed. 1065, 44 S. Ct. 486.

³² *Baker v. Druessedow (1923)* 263 U. S. 137, 68 L. Ed. 212, 44 S. Ct. 40. ³⁵ *United Gas Public Service Co. v. Texas (1938)* 303 U. S. 123, 82 L. Ed. 702, 58 S. Ct. 483, rehearing denied 303 U. S. 667, 82 L. Ed. 1124, 58 S. Ct. —.

³³ *United States ex rel. Milwaukee Social Democratic Pub. Co. v. Burle-*

§ 279. — Rules of Evidence Need Not Control.

The fact that the agency is not bound by the rules of evidence which would be applicable to trials in court or by technical rules of procedure does not invalidate its proceedings if substantial rights of the parties are not infringed.³⁶

§ 280. Statutes of Limitation.

The fact that disallowance of a claim for refund is made final unless a petition for a hearing before an administrative agency is filed within three months, is not inconsistent with due process.³⁷

*B. Fair Hearing***§ 281. Fair Hearing: Prime Requisite of Adversary Proceedings.**

A full and fair hearing must, as the prime standard of procedural due process, be accorded to every interested party to an adversary administrative proceeding, or the resulting determination is invalid.³⁸

36 Federal Communications Commission.

Federal Communications Commission v. Pottsville Broadcasting Co. (1940) 309 U. S. 134, 84 L. Ed. 656, 60 S. Ct. 437; Rochester Telephone Corp. v. United States (1939) 307 U. S. 125, 89 L. Ed. 1147, 59 S. Ct. 754. Secretary of Agriculture.

Tagg Bros. & Moorhead v. United States (1930) 280 U. S. 420, 74 L. Ed. 524, 50 S. Ct. 220. State Agencies.

See Louisville & N. R. Co. v. Finn (1915) 235 U. S. 601, 59 L. Ed. 379, 35 S. Ct. 146.

Workmen's Compensation Cases.

Crowell v. Benson (1932) 285 U. S. 22, 76 L. Ed. 598, 52 S. Ct. 285.

³⁷ Anniston Mfg. Co. v. Davis (1937) 301 U. S. 337, 81 L. Ed. 1143, 59 S. Ct. 816.

38 Alien Cases.

United States ex rel. Vajtauer v. Commissioner of Immigration (1927) 273 U. S. 103, 71 L. Ed. 560, 47 S. Ct. 302; Kwock Jan Fat v. White (1920) 253 U. S. 454, 64 L. Ed. 1010, 40 S. Ct. 566; Gegiow v. Uhl (1915) 239 U. S. 3, 60 L. Ed. 114, 36 S. Ct. 2;

The Japanese Immigrant Case (1903) 189 U. S. 86, 47 L. Ed. 721, 23 S. Ct. 611; Ungar v. Seaman (C. C. A. 8th, 1924) 4 F. (2d) 80.

Board of Tax Appeals.

Foss v. Commissioner of Internal Revenue (C. C. A. 1st, 1935) 75 F. (2d) 326.

Federal Communications Commission.

Federal Communications Commission v. Pottsville Broadcasting Co. (1940) 309 U. S. 134, 84 L. Ed. 656, 60 S. Ct. 437.

Interstate Commerce Commission.

Shields v. Utah Idaho C. R. Co. (1938) 305 U. S. 177, 83 L. Ed. 111, 59 S. Ct. 160; The New England Divisions Case (1923) 261 U. S. 184, 67 L. Ed. 605, 43 S. Ct. 270; Spiller v. Atchison, T. & S. F. R. Co. (1920) 253 U. S. 117, 64 L. Ed. 810, 40 S. Ct. 466; Louisville & N. R. Co. v. Finn (1915) 235 U. S. 601, 59 L. Ed. 379, 35 S. Ct. 146; *Interstate Commerce Commission v. Louisville & N. R. Co. (1913) 227 U. S. 88, 57 L. Ed. 431, 33 S. Ct. 185.

National Labor Relations Board.

Consolidated Edison Co. v. National Labor Relations Board (1938)

The question of a full and fair hearing goes to the very foundation of the validity of administrative proceedings, being one of the rudiments of fair play assured to every litigant by the Federal Constitution as a minimal requirement.³⁹

305 U. S. 197, 83 L. Ed. 126, 59 S. Ct. 206; *Inland Steel Co. v. National Labor Relations Board* (C. C. A. 7th, 1940) 109 F. (2d) 9.

Postmaster-General.

United States ex rel. Milwaukee Social Democratic Pub. Co. v. Burleson (1921) 255 U. S. 407, 65 L. Ed. 704, 41 S. Ct. 352.

Secretary of Agriculture.

* *Morgan v. United States* (1938) 304 U. S. 1, 82 L. Ed. 1129, 58 S. Ct. 773, rehearing denied 304 U. S. 23, 82 L. Ed. 1135, 58 S. Ct. 999; * *Morgan v. United States* (1936) 298 U. S. 468, 80 L. Ed. 1288, 56 S. Ct. 906; *St. Joseph Stock Yards Co. v. United States* (1936) 298 U. S. 38, 80 L. Ed. 1033, 56 S. Ct. 720.

State Agencies.

Railroad Commission of California v. Pacific Gas & Electric Co. (1938) 302 U. S. 388, 82 L. Ed. 319, 58 S. Ct. 334; *Ohio Bell Telephone Co. v. Public Utilities Commission* (1937) 301 U. S. 292, 81 L. Ed. 1093, 57 S. Ct. 724; *Missouri ex rel. Hurwitz v. North* (1926) 271 U. S. 40, 70 L. Ed. 818, 46 S. Ct. 384; *Londoner v. Denver* (1908) 210 U. S. 373, 52 L. Ed. 1103, 28 S. Ct. 708; *Western Union Telegraph Co. v. Industrial Commission of Minn.* (D. C. D. Minn., Fourth Div., 1938) 24 F. Supp. 370.

Quotations.

"The right to a fair and open hearing is one of the rudiments of fair play assured to every litigant by the Federal Constitution as a minimal requirement. *Ohio Bell Telephone Co. v. Public Utilities Comm'n*, 301 U. S. 292, 304, 305. There must be due notice and an opportunity to be heard, the procedure must be consistent with the essentials of a fair trial, and the

Commission must act upon evidence and not arbitrarily." (Mr. Chief Justice Hughes in *Railroad Commission of California v. Pacific Gas & Electric Co.* (1938) 302 U. S. 388, 393, 82 L. Ed. 319, 58 S. Ct. 334.)

"In the assessment, apportionment and collection of taxes upon property within their jurisdiction the Constitution of the United States imposes few restrictions upon the States. In the enforcement of such restrictions as the Constitution does impose this court has regarded substance and not form. But where the legislature of a State, instead of fixing the tax itself, commits to some subordinate body the duty of determining whether, in what amount, and upon whom it shall be levied, and of making its assessment and apportionment, due process of law requires that at some stage of the proceedings before the tax becomes irrevocably fixed, the taxpayer shall have an opportunity to be heard, of which he must have notice, either personal, by publication, or by a law fixing the time and place of the hearing." (Mr. Justice Moody in *Londoner v. Denver* (1908) 210 U. S. 373, 385, 386, 52 L. Ed. 1103, 28 S. Ct. 708.)

39 Interstate Commerce Commission.

Shields v. Utah Idaho C. R. Co. (1939) 305 U. S. 177, 83 L. Ed. 111, 59 S. Ct. 160.

National Labor Relations Board.

Inland Steel Co. v. National Labor Relations Board (C. C. A. 7th, 1940) 109 F. (2d) 9.

Secretary of Agriculture.

* *Morgan v. United States* (1938) 304 U. S. 1, 82 L. Ed. 1129, 58 S. Ct. 773, rehearing denied 304 U. S. 23, 82 L. Ed. 1135, 58 S. Ct. 999.

The requirement of such a hearing relates to substance, not to form,⁴⁰ and refers to judicial standards, not in any technical sense but with respect to those fundamental requirements of fairness which are the essence of due process in a proceeding of a judicial nature, that is, an adversary proceeding. The phrase has obvious reference to the tradition of judicial proceedings in which evidence is received and weighed and argument is heard by the trier of the facts.⁴¹ Decision must be after a hearing in good faith, however summary.⁴²

State Agencies.

Railroad Commission of California v. Pacific Gas & Electric Co. (1938) 302 U. S. 388, 82 L. Ed. 319, 58 S. Ct. 334; Ohio Bell Telephone Co. v. Public Utilities Commission (1937) 301 U. S. 292, 81 L. Ed. 1093, 57 S. Ct. 724.

Quotations.

"On this appeal, plaintiffs again contend (1) that the Secretary's order was made without the hearing required by the statute and (2) that the order was arbitrary and unsupported by substantial evidence.

"The first question goes to the very foundation of the action of administrative agencies entrusted by the Congress with broad control over activities which in their detail cannot be dealt with directly by the legislature. The vast expansion of this field of administrative regulation in response to the pressure of social needs is made possible under our system by adherence to the basic principles that the legislature shall appropriately determine the standards of administrative action and that in administrative proceedings of a quasi-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand 'a fair and open hearing,'—essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process. Such a hearing has been described as an

'inexorable safeguard.' St. Joseph Stock Yards Co. v. United States, 298 U. S. 38, 73; Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U. S. 292, 304, 305; Railroad Commission of California v. Pacific Gas & Electric Co., 302 U. S. 388, 393; Morgan v. United States, supra. And in equipping the Secretary of Agriculture with extraordinary powers under the Packers and Stockyards Act, the Congress explicitly recognized and emphasized this requirement by making his action depend upon a 'full hearing.' § 310." (Mr. Chief Justice Hughes in Morgan v. United States (1938) 304 U. S. 1, 14, 15, 82 L. Ed. 1129, 58 S. Ct. 773, rehearing denied 304 U. S. 23, 82 L. Ed. 1135, 58 S. Ct. 999.)

⁴⁰ Morgan v. United States (1938) 304 U. S. 1, 82 L. Ed. 1129, 58 S. Ct. 773, rehearing denied 304 U. S. 23, 82 L. Ed. 1135, 58 S. Ct. 999; The Japanese Immigrant Case (1903) 189 U. S. 86, 47 L. Ed. 721, 23 S. Ct. 611.

⁴¹ Morgan v. United States (1938) 304 U. S. 1, 82 L. Ed. 1129, 58 S. Ct. 773, rehearing denied 304 U. S. 23, 82 L. Ed. 1135, 58 S. Ct. 999; Shields v. Utah Idaho C. R. Co. (1938) 305 U. S. 177, 83 L. Ed. 111, 59 S. Ct. 160. See Foss v. Commissioner of Internal Revenue (C. C. A. 1st, 1935) 75 F. (2d) 326.

⁴² Kwock Jan Fat v. White (1920) 253 U. S. 454, 64 L. Ed. 1010, 40 S. Ct. 566.

The hearing by which reference is made to the tradition of judicial proceedings and the requirements of procedural due process, is variously referred to as "full hearing,"⁴³ a "fair and open" hearing,⁴⁴ a "fair hearing,"⁴⁵ or simply a "hearing."⁴⁶ It is also said that administrative procedure must be consistent with the essentials of a fair trial.⁴⁷ This constitutional requirement of a fair hearing in administrative proceedings was recognized by Congress in enacting the Packers and Stockyards Act,⁴⁸ by making the Secretary's action thereunder depend upon "full hearing";⁴⁹ in the Railway Labor Act,⁵⁰ by providing that the Interstate Commerce Commission must determine "after hearing,"⁵¹ in the Longshoremen's and Harbor Workers' Compensation Act⁵² by requiring a public hearing and a record of the hearing,⁵³ and applies equally to proceedings of state administrative agencies.⁵⁴

⁴³ See the Packers and Stockyards Act, 7 USCA 211. See also *Morgan v. United States* (1938) 304 U. S. 1, 82 L. Ed. 1129, 58 S. Ct. 773, rehearing denied 304 U. S. 23, 82 L. Ed. 1135, 58 S. Ct. 999.

⁴⁴ *Railroad Commission of California v. Pacific Gas & Electric Co.* (1938) 302 U. S. 388, 82 L. Ed. 319, 58 S. Ct. 334.

⁴⁵ *St. Joseph Stock Yards Co. v. United States* (1936) 298 U. S. 38, 80 L. Ed. 1033, 56 S. Ct. 720.

⁴⁶ *Shields v. Utah Idaho C. R. Co.* (1938) 305 U. S. 177, 83 L. Ed. 111, 59 S. Ct. 160.

⁴⁷ *Railroad Commission of California v. Pacific Gas & Electric Co.* (1938) 302 U. S. 388, 82 L. Ed. 319, 58 S. Ct. 334.

⁴⁸ 7 USCA 211.

⁴⁹ *Morgan v. United States* (1938) 304 U. S. 1, 82 L. Ed. 1129, 58 S. Ct. 773, rehearing denied 304 U. S. 23, 82 L. Ed. 1135, 58 S. Ct. 999.

⁵⁰ 45 USCA 151 et seq.

⁵¹ "In considering the effect of the Commission's determination, the fundamental question is the intent of Congress. The language of the provi-

sion points to definitive action. The Commission is to 'determine.' The Commission must determine 'after hearing.' The requirement of a 'hearing' has obvious reference 'to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts.' The 'hearing' is 'the hearing of evidence and argument.' *Morgan v. United States*, 298 U. S. 468, 480. And the manifest purpose in requiring a hearing is to comply with the requirements of due process upon which the parties affected by the determination of an administrative body are entitled to insist. *Interstate Commerce Comm'n v. Louisville & Nashville R. Co.*, 227 U. S. 88, 91. The Commission is not only authorized but 'directed' to give the hearing and make the determination when requested. . . ." (*Mr. Chief Justice Hughes in Shields v. Utah Idaho C. R. Co.* (1938) 305 U. S. 177, 182, 83 L. Ed. 111, 59 S. Ct. 160.)
⁵² 33 USCA 901-950.

⁵³ *Crowell v. Benson* (1932) 285 U. S. 22, 76 L. Ed. 598, 52 S. Ct. 285.

⁵⁴ *Londoner v. Denver* (1908) 210 U. S. 373, 52 L. Ed. 1103, 28 S. Ct. 708.

Although the power to expel aliens belongs not to the judicial, but to the political department of the government, a fair hearing must be accorded in a proceeding for deportation.⁵⁵

Even though a statutory scheme does not specifically provide for the requisites of a fair hearing, where an agency in fact allows a party a fair hearing, due process is not denied.⁵⁶

The federal courts will not hold that a hearing required by state law has not been properly accorded, where the agency held hearings at which the party's evidence was received and its arguments presented, in the absence of a state decision warranting the conclusion that the agency did not afford the hearing required by state law.⁵⁷

§ 282. Requirements of Fair Hearing in General.

Whether a hearing is fair must be determined by the character of the hearing, not by that of the order entered thereon. A fair hearing is one in which ample opportunity is afforded to all parties to make, by evidence and argument, a showing fairly adequate to establish the propriety or impropriety, from the standpoint of justice and law, of the step asked to be taken.⁵⁸ A fair hearing is afforded where there

⁵⁵ *Hays v. Hatges* (C. C. A. 8th, 1938) 94 F. (2d) 67.

⁵⁶ *Louisville & N. R. Co. v. Finn* (1915) 235 U. S. 601, 59 L. Ed. 379, 35 S. Ct. 146.

⁵⁷ *Railroad Commission of California v. Pacific Gas & Electric Co.* (1938) 302 U. S. 388, 82 L. Ed. 319, 58 S. Ct. 334.

⁵⁸ *The New England Divisions Case* (1923) 261 U. S. 184, 67 L. Ed. 605, 43 S. Ct. 270.

"The Government further insists that the Commerce Act (36 Stat. 743) requires the Commission to obtain information necessary to enable it to perform the duties and carry out the objects for which it was created, and having been given legislative power to make rates it can act, as could Congress, on such information, and therefore its findings must be presumed to have been supported by such information, even though not

formally proved at the hearing. But such a construction would nullify the right to a hearing,—for manifestly there is no hearing when the party does not know what evidence is offered or considered and is not given an opportunity to test, explain, or refute. The information gathered under the provisions of § 12 may be used as basis for instituting prosecutions for violations of the law, and for many other purposes, but is not available, as such, in cases where the party is entitled to a hearing. The Commission is an administrative body and, even where it acts in a quasi-judicial capacity, is not limited by the strict rules, as to the admissibility of evidence, which prevail in suits between private parties. *Int. Com. Comm. v. Baird*, 194 U. S. 25. But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve

is ample time for, and every party is in fact afforded the opportunity of, introducing any and all the evidence it desires, making a voluminous record.⁵⁹ A fair hearing is afforded where all parties concerned participate, are cognizant of the evidence acted on by the agency, and have full opportunity to object, to cross-examine, and to introduce evidence on their own part.⁶⁰ The fact that a hearing is informal does not make it arbitrary or unfair where there is no sacrifice of the essential rights of the parties.⁶¹ Under the Fourteenth Amendment due process is not denied by state administrative procedure because there is no formal issue and no method of requiring the production of evidence, where, in the hearing before the agency pleadings were sufficiently formal, the complaining party was allowed to raise such issues and introduce such evidence as it desired, and there is nothing to show that it suffered for lack of compulsory process against witnesses.⁶²

A hearing may be a full one, although the evidence introduced does not enable the tribunal to dispose of the issues completely or permanently; and although the evidence leaves many doubts in the mind of the tribunal so that it is convinced when entering the order that, upon further investigation, some changes in it will have to be made. To grant immediate relief, subject to later readjustments, under such circumstances, is not a transfer of amounts in issue pending a decision. It is clear that the order is not obnoxious to the due process clause

the essential rules of evidence by which rights are asserted or defended. In such cases the Commissioners cannot act upon their own information as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding; for otherwise, even though it appeared that the order was without evidence, the manifest deficiency could always be explained on the theory that the Commission had before it extraneous, unknown but presumptively sufficient in-

formation to support the finding. *United States v. Baltimore & Ohio S. W. R. R.*, 226 U. S. 14." (Mr. Justice Lamar in *Interstate Commerce Commission v. Louisville & N. R. Co.* (1913) 227 U. S. 88, 93, 94, 57 L. Ed. 431, 33 S. Ct. 185.)

⁵⁹ *The New England Divisions Case* (1923) 261 U. S. 184, 67 L. Ed. 605, 43 S. Ct. 270; *Ungar v. Seaman* (C. C. A. 8th, 1924) 4 F. (2d) 80.

⁶⁰ *Spiller v. Atchison, T. & S. F. R. Co.* (1920) 253 U. S. 117, 64 L. Ed. 810, 40 S. Ct. 466.

⁶¹ *Spiller v. Atchison, T. & S. F. R. Co.* (1920) 253 U. S. 117, 64 L. Ed. 810, 40 S. Ct. 466.

⁶² *Louisville & N. R. Co. v. Finn* (1915) 235 U. S. 601, 59 L. Ed. 379, 35 S. Ct. 146.

because provisional. If this were not so most temporary injunctions would violate the Constitution.⁶³

The dismissal by the National Labor Relations Board of a complaint, without prejudice to the Board's rights to reinstate the proceeding, entitled the Board subsequently to reinstate the cause and determine the issue on testimony theretofore heard, notwithstanding the lapse of considerable time between the first hearing and the order of reinstatement, where the party affected does not offer additional testimony as to changed conditions. There is no denial of due process.⁶⁴

Where an agency, empowered by statute to modify its report and order at any time before a transcript of the administrative record has been filed in a court having jurisdiction to review its action, files modified findings and a modified order before such filing of a transcript, there is no denial of due process, even though several years have elapsed between the time of the original, and that of the modified, report and order.⁶⁵

Due process is not denied by the requirement that a claimant submit his claim and make proof before the agency at his own expense. This is in accord with the practice in all judicial and administrative proceedings.⁶⁶ Nor is it denied by the requirement that a fee, often less than the expense involved, be paid to help cover the expenses of stenographers, engineers and others engaged in compiling records at the state's expense, necessary to the preservation of the party's rights.⁶⁷

Failure of an administrative agency conducting a hearing to determine an alien's fitness to enter, to inform the immigrant of his rights under the statute may be a denial of a fair hearing.⁶⁸ However, where an alien proceeded on the theory that he had been born in the United States, and failed to prove it, he could not complain that the hearing was unfair because the agency failed to inform him of his rights or to question him about his possible status as the son of a resident alien.⁶⁹

⁶³ *The New England Divisions Case* (1923) 261 U. S. 184, 67 L. Ed. 605, 43 S. Ct. 270.

⁶⁴ *C. G. Conn, Ltd. v. National Labor Relations Board* (C. C. A. 7th, 1939) 108 F. (2d) 390.

⁶⁵ *Federal Trade Commission v. Kay* (C. C. A. 7th, 1929) 35 F. (2d) 160, cert. den. 281 U. S. 764, 74 L. Ed. 1173, 50 S. Ct. 463.

⁶⁶ *Pacific Live Stock Co. v. Lewis* (1916) 241 U. S. 440, 60 L. Ed. 1084, 36 S. Ct. 637.

⁶⁷ *Pacific Live Stock Co. v. Lewis* (1916) 241 U. S. 440, 60 L. Ed. 1084, 36 S. Ct. 637.

⁶⁸ *Johnson v. Tertzag* (C. C. A. 1st, 1924) 2 F. (2d) 40.

⁶⁹ *Ex parte Tsugio Miyazono* (C. C. A. 9th, 1931) 53 F. (2d) 172.

§ 283. Delay in Commencement of Hearing.

A mere delay in the commencement of a hearing has no bearing on the fairness of the hearing.⁷⁰ Moreover, the constitutional right to a speedy trial guaranteed to an accused person does not obtain in administrative cases, even where, as in alien cases, there are some likenesses to a criminal proceeding.⁷¹

§ 284. Place of Hearing.

Determining the place at which a hearing shall be held is a matter of administrative discretion.⁷² There is no abuse of discretion or unfairness to an alien in the choice of a place for a deportation hearing easily accessible to the witnesses and to the alien, although his counsel had asked to have the hearing at the immigration station in a different place.⁷³

§ 285. Presence of Counsel or Aide.

The right to a fair hearing includes the right to have counsel present.⁷⁴ Where the government claims that an alien is deportable because insane, it denies a fair hearing to accept his waiver of counsel.⁷⁵ But where there was opportunity to have counsel present of which a party did not avail himself, and it did not appear that his rights had been jeopardized by the absence of counsel, a full hearing was accorded.⁷⁶ The presence of alien's counsel at a preliminary hearing at which testimony was taken was not essential to a fair hearing, where in later proceedings counsel was present and had opportunity to cross-examine.⁷⁷

Where a Board of Special Inquiry informed an alien at the outset of his right, under the Immigration Act of 1917,⁷⁸ to have a relative

⁷⁰ *Quon Quon Poy v. Johnson* (1927) 273 U. S. 352, 71 L. Ed. 680, 47 S. Ct. 346.

⁷¹ *Lai To Hong v. Ebey* (C. C. A. 7th, 1928) 25 F. (2d) 714.

⁷² *United States ex rel. Mastoras v. McCandless* (C. C. A. 3d, 1932) 61 F. (2d) 366.

⁷³ *United States ex rel. Mastoras v. McCandless* (C. C. A. 3d, 1932) 61 F. (2d) 366.

⁷⁴ *Dengeleski ex rel. Saccardio v. Tillinghast* (C. C. A. 1st, 1933) 65 F. (2d) 440; *United States ex rel. Dioguardi v. Flynn* (D. C. W. D. N. Y. 1926) 15 F. (2d) 576. But see *Brownlow v. Miers* (C. C. A. 5th, 1928) 28

F. (2d) 653, rev'g *Miers v. Brownlow* (D. C. S. D. Ala., S. Div., 1927) 21 F. (2d) 376.

⁷⁵ *United States ex rel. Dioguardi v. Flynn* (D. C. W. D. N. Y. 1926) 15 F. (2d) 576.

⁷⁶ *Dengeleski ex rel. Saccardio v. Tillinghast* (C. C. A. 1st, 1933) 65 F. (2d) 440; *United States ex rel. Di Costanzo v. Uhl* (D. C. S. D. N. Y. 1934) 6 F. Supp. 791.

⁷⁷ *Ex parte Vilarino* (C. C. A. 9th, 1931) 50 F. (2d) 582. See *Plane v. Carr* (C. C. A. 9th 1927) 19 F. (2d) 470, cert. den. 275 U. S. 545, 72 L. Ed. 417, 48 S. Ct. 84.

⁷⁸ 8 USCA 173 et seq.

present, and he expressly waived the right and stated that he was willing to proceed with the hearing, the hearing was not unfair.⁷⁹

§ 286. Limitation of Right to Fair Hearing.

No hearing is required as a requisite to the making of a quasi-legislative order, in the nature of a regulation which is of general application, one which sets up a rule of conduct which applies equally to all members of the class concerned.⁸⁰ And there is not the same constitutional right to a fair hearing with respect to the proceedings of an advisory administrative agency, such as the Tariff Commission. The Tariff Commission, whose findings merely advise action by the President, must not act arbitrarily in conducting hearings upon which the findings are based, but it need not afford a fair hearing beyond that required by statute.⁸¹ A statutory requirement of an advisory agency that a hearing be given includes a command by implication to do everything necessary to make the hearing fair. This, however, differs from the constitutional requirement of full hearing in adversary proceedings which may be followed by administrative action affecting

⁷⁹ *Quon Quon Poy v. Johnson* (1927) 273 U. S. 352, 71 L. Ed. 680, 47 S. Ct. 346.

⁸⁰ *Bi-Metallic Investment Co. v. State Board of Equalization of Colorado* (1915) 239 U. S. 441, 60 L. Ed. 372, 36 S. Ct. 141.

"Where a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule. If the result in this case had been reached as it might have been by the State's doubling the rate of taxation, no one would suggest that the Fourteenth

Amendment was violated unless every person affected had been allowed an opportunity to raise his voice against it before the body entrusted by the state constitution with the power. In considering this case in this court we must assume that the proper state machinery has been used, and the question is whether, if the state constitution had declared that Denver had been undervalued as compared with the rest of the State and had decreed that for the current year the valuation should be forty per cent. higher, the objection now urged could prevail. It appears to us that to put the question is to answer it. There must be a limit to individual argument in such matters if government is to go on." (Mr. Justice Holmes in *Bi-Metallic Investment Co. v. State Board of Equalization of Colorado* (1915) 239 U. S. 441, 445, 60 L. Ed. 372, 36 S. Ct. 141.)

⁸¹ *Norwegian Nitrogen Products Co. v. United States* (1933) 288 U. S. 294, 77 L. Ed. 796, 53 S. Ct. 350.

legal rights.⁸² When the fairness of a hearing before an advisory agency is to be determined by the sense of justice of the administrative officials, clothed by the statute with discretionary powers, their resolve is not subject to impeachment for unwisdom without more, but must be shown to be arbitrary.⁸³

§ 287. Fair Hearing: Test Is Whole Record.

The question as to whether a fair hearing has been accorded is open to full judicial inquiry, and is in no sense concluded by assertion of the administrative agency in question that a fair hearing was given.⁸⁴ A claim that a fair hearing was not accorded will be tested by examination of the entire record, report and findings, and must fail if based only on excerpts therefrom which tend to show that a fair hearing was had.⁸⁵ Interrogatories may be addressed to the agency on pertinent matters outside the administrative record.

The denial of a copy of the transcript of a party's testimony is not a denial of due process where the proceeding was merely investigatory, and not a hearing in an adversary proceeding for the determination of private rights, even though it was taken for use in a subsequent judicial proceeding.⁸⁶

§ 288. Administrative Agency May Not Compromise with Requirement of Fair Hearing.

These requirements of fairness in an administrative hearing extend to every portion of the hearing. They are not exhausted in the taking

⁸² Norwegian Nitrogen Products Co. v. United States (1933) 288 U. S. 294, 77 L. Ed. 796, 53 S. Ct. 350.

⁸³ Norwegian Nitrogen Products Co. v. United States (1933) 288 U. S. 294, 77 L. Ed. 796, 53 S. Ct. 350.

⁸⁴ Interstate Commerce Commission. Interstate Commerce Commission v. Louisville & N. R. Co. (1913) 227 U. S. 88, 57 L. Ed. 431, 33 S. Ct. 185. National Labor Relations Board.

National Labor Relations Board v. Cherry Cotton Mills (C. C. A. 5th, 1938) 98 F. (2d) 444, rehearing denied 98 F. (2d) 1021; National Labor Relations Board v. Lane Cotton Mills Co. (C. C. A. 5th, 1940) 108 F. (2d) 568, rehearing denied 111 F. (2d) 814.

Secretary of Agriculture.

* Morgan v. United States (1936) 298 U. S. 468, 80 L. Ed. 1288, 56 S. Ct. 906; s. c. (1938) 304 U. S. 1, 82 L. Ed. 1129, 58 S. Ct. 773, rehearing denied 304 U. S. 23, 82 L. Ed. 1135, 58 S. Ct. 999.

State Agencies.

Londoner v. Denver (1908) 210 U. S. 373, 52 L. Ed. 1103, 28 S. Ct. 708.

⁸⁵ Consolidated Edison Co. v. National Labor Relations Board (1938) 305 U. S. 197, 83 L. Ed. 126, 59 S. Ct. 206; Ohio v. United States (1934) 292 U. S. 498, 78 L. Ed. 1388, 54 S. Ct. 792.

⁸⁶ Securities & Exchange Commission v. Torr (D. C. S. D. N. Y. 1936) 15 F. Supp. 144.

or consideration of evidence, but extend to the concluding part of the procedure as well as to the beginning and intermediate steps.⁸⁷ No administrative agency can constitutionally compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when the minimal requirements have been neglected or ignored.⁸⁸ Legislative agencies have varying qualifications, and work in a field peculiarly exposed to political demands. Some may be expert and impartial, others subservient. It is not difficult for any of them to observe the requirements of law in giving a full hearing.⁸⁹

The constitutional requisite of a full hearing must be especially maintained where the administrative action authorized, dependent upon the outcome of the administrative proceedings, is of substantial

⁸⁷ *Morgan v. United States* (1938) 304 U. S. 1, 82 L. Ed. 1129, 58 S. Ct. 773, rehearing denied 304 U. S. 23, 82 L. Ed. 1135, 58 S. Ct. 999; *Interstate Commerce Commission v. Louisville & N. R. Co.* (1913) 227 U. S. 88, 57 L. Ed. 431, 33 S. Ct. 185.

⁸⁸ *Ohio Bell Telephone Co. v. Public Utilities Commission* (1937) 301 U. S. 292, 81 L. Ed. 1039, 57 S. Ct. 724; *Inland Steel Co. v. National Labor Relations Board* (C. C. A. 7th, 1940) 109 F. (2d) 9.

"Regulatory commissions have been invested with broad powers within the sphere of duty assigned to them by law. Even in quasi-judicial proceedings their informed and expert judgment exacts and receives a proper deference from courts when it has been reached with due submission to constitutional restraints. *West Ohio Gas Co. v. Public Utilities Comm'n* (No. 1), *supra*, p. 70; *West Ohio Gas Co. v. Public Utilities Comm'n* (No. 2), 294 U. S. 79; *Los Angeles Gas & Electric Corp. v. Railroad Commission*, 289 U. S. 287, 304. Indeed, much that they do within the realm of administrative discretion is exempt from supervision if those restraints have been obeyed. All the more

insistent is the need, when power has been bestowed so freely, that the 'inexorable safeguard' (*St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 73) of a fair and open hearing be maintained in its integrity. *Morgan v. United States*, 298 U. S. 468, 480, 481; *Interstate Commerce Comm'n v. Louisville & N. R. Co.*, *supra*. The right to such a hearing is one of 'the rudiments of fair play' (*Chicago, M. & St. P. Ry. Co. v. Polt*, 232 U. S. 165, 168) assured to every litigant by the Fourteenth Amendment as a minimal requirement. *West Ohio Gas Co. v. Public Utilities Comm'n* (No. 1), (No. 2), *supra*; *Brinkerhoff-Faris Co. v. Hill*, 281 U. S. 673, 682. Cf. *Norwegian Nitrogen Co. v. United States*, *supra*. There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored." (Mr. Justice Cardozo in *Ohio Bell Telephone Co. v. Public Utilities Commission* (1937) 301 U. S. 292, 304, 81 L. Ed. 1039, 57 S. Ct. 724.)

⁸⁹ *St. Joseph Stock Yards Co. v. United States* (1936) 298 U. S. 38, 80 L. Ed. 1033, 59 S. Ct. 720.

breadth, such as that of the Secretary of Agriculture under the Packers and Stockyards Act.⁹⁰

Hearings are sometimes required by statute in such a manner as to enable a reviewing court to understand the basis and reasons for the agency's action.⁹¹

§ 289. Court Will Not Probe Mental Processes of Agency if Required Fair Hearing Given.

Many things done within the realm of administrative discretion are exempt from judicial supervision if constitutional restraints, particularly those requiring the inexorable safeguard of a fair hearing, have been obeyed.⁹² Thus where a fair hearing has been accorded the courts will not probe the mental processes of the agency,⁹³ inquire into the methods of reasoning used by an agency in reaching its result,⁹⁴ or inquire as to the correctness of the agency's conclusions from the evidence.⁹⁵ There is then assurance that the legislative process entrusted to the agency is being properly administered.

1. Right to Know and Meet Opposing Claims

§ 290. A Fundamental Right.

The right to know and meet opposing claims is a right to have the issues and contentions of opposing parties clearly defined so as to be able to meet them by the introduction of evidence and argument. It must be afforded to every interested party to an adversary proceeding as a requisite of a full hearing.⁹⁶ Without the right, the other

⁹⁰ *Morgan v. United States* (1938) 304 U. S. 1, 82 L. Ed. 1129, 58 S. Ct. 773, rehearing denied 304 U. S. 23, 82 L. Ed. 1135, 58 S. Ct. 999.

⁹¹ *Norwegian Nitrogen Products Co. v. United States* (1933) 288 U. S. 294, 77 L. Ed. 796, 53 S. Ct. 350.

⁹² *Ohio Bell Telephone Co. v. Public Utilities Commission* (1937) 301 U. S. 292, 81 L. Ed. 1093, 57 S. Ct. 724.

⁹³ *Morgan v. United States* (1938) 304 U. S. 1, 82 L. Ed. 1129, 58 S. Ct. 773, rehearing denied 304 U. S. 23, 82 L. Ed. 1135, 58 S. Ct. 999; *Youngstown Sheet & Tube Co. v. United States* (D. C. N. D. Ohio, E. D., 1934) 7 F. Supp. 33, aff'd 295 U. S. 476, 79

L. Ed. 1553, 55 S. Ct. 822, rehearing denied 296 U. S. 661, 80 L. Ed. 471, 56 S. Ct. 81.

⁹⁴ *Railroad Commission of California v. Pacific Gas & Electric Co.* (1938) 302 U. S. 388, 82 L. Ed. 319, 58 S. Ct. 334.

⁹⁵ *United States ex rel. Tisi v. Tod* (1924) 264 U. S. 131, 68 L. Ed. 590, 44 S. Ct. 260. See § 575 et seq.

⁹⁶ *Alien Cases.*

White v. Chin Fong (1920) 253 U. S. 90, 64 L. Ed. 797, 40 S. Ct. 449. *Interstate Commerce Commission.*

Shields v. Utah Idaho C. R. Co. (1938) 305 U. S. 177, 83 L. Ed. 111, 59 S. Ct. 160.

rights incident to a hearing, such as the right to introduce evidence and present argument, become barren and valueless.⁹⁷ Failure to afford the right is more than an irregularity in practice, it is a vital defect.⁹⁸ It is not technical, but rests on the plainest principles of justice and fair play.⁹⁹ The due process clause guarantees no particular form of procedure to enforce the right, as it is a substantial right which does not depend upon form.¹

Adequate opportunity to know and meet opposing claims is afforded where the purpose and nature of a hearing become apparent, in the substantial sense, before the hearing commences,² or during the hearing in time for reception of all relevant evidence and argument offered to meet the opposing claims.³ An order is void where an

National Labor Relations Board.

Consolidated Edison Co. v. National Labor Relations Board (1938) 305 U. S. 197, 83 L. Ed. 126, 59 S. Ct. 206; National Labor Relations Board v. Mackay Radio & Telegraph Co. (1938) 304 U. S. 333, 82 L. Ed. 1381, 58 S. Ct. 904; Jefferson Electric Co. v. National Labor Relations Board (C. C. A. 7th, 1939) 102 F. (2d) 949. Secretary of Agriculture.

* Morgan v. United States (1938) 304 U. S. 1, 82 L. Ed. 1129, 58 S. Ct. 773, rehearing denied 304 U. S. 23, 82 L. Ed. 1135, 58 S. Ct. 999; Morgan v. United States (1936) 298 U. S. 468, 80 L. Ed. 1288, 56 S. Ct. 906. State Agencies.

See Pacific Live Stock Co. v. Lewis (1916) 241 U. S. 440, 60 L. Ed. 1084, 36 S. Ct. 637.

Tariff Commission.

See Norwegian Nitrogen Products Co. v. United States (1933) 288 U. S. 294, 77 L. Ed. 796, 53 S. Ct. 350.

⁹⁷ Consolidated Edison Co. v. National Labor Relations Board (1938) 305 U. S. 197, 83 L. Ed. 126, 59 S. Ct. 206; Shields v. Utah Idaho C. R. Co. (1938) 305 U. S. 177, 83 L. Ed. 111, 59 S. Ct. 160; Morgan v. United States (1938) 304 U. S. 1, 82 L. Ed. 1129, 58 S. Ct. 773, rehearing denied 304 U. S. 23, 82 L. Ed. 1135, 58 S. Ct. 999.

⁹⁸ Consolidated Edison Co. v. National Labor Relations Board (1938) 305 U. S. 197, 83 L. Ed. 126, 59 S. Ct. 206; Morgan v. United States (1938) 304 U. S. 1, 82 L. Ed. 1129, 58 S. Ct. 773, rehearing denied 304 U. S. 23, 82 L. Ed. 1135, 58 S. Ct. 999. See National Labor Relations Board v. Hopwood Retinning Co., Inc. (C. C. A. 2d, 1938) 98 F. (2d) 97.

⁹⁹ Consolidated Edison Co. v. National Labor Relations Board (1938) 305 U. S. 197, 83 L. Ed. 126, 59 S. Ct. 206.

¹ American Toll Bridge Co. v. Railroad Commission (1939) 307 U. S. 486, 83 L. Ed. 1414, 59 S. Ct. 948; National Labor Relations Board v. Mackay Radio & Telegraph Co. (1938) 304 U. S. 333, 82 L. Ed. 1381, 58 S. Ct. 904; Morgan v. United States (1936) 298 U. S. 468, 478, 80 L. Ed. 1288, 56 S. Ct. 906; s. c. (1938) 304 U. S. 1, 82 L. Ed. 1129, 58 S. Ct. 773, rehearing denied 304 U. S. 23, 82 L. Ed. 1135, 58 S. Ct. 999.

² Northwestern Bell Telephone Co. v. Nebraska State Railway Commission (1936) 297 U. S. 471, 80 L. Ed. 810, 56 S. Ct. 536.

³ See National Labor Relations Board v. Mackay Radio & Telegraph Co. (1938) 304 U. S. 333, 82 L. Ed. 1381, 58 S. Ct. 904.

agency ignores the question presented to it and decides another not raised,⁴ or where its effective date is prior to the hearing.⁵ It is not void where it is to become effective after review by a court which has power to examine the evidence taken before the agency, and to take other evidence, including evidence opposed to that taken before the agency.⁶

Thus the subject is naturally divided into two parts: the preliminary stages, i. e., whether adequate notice is given, and the later stages, i. e., whether lack of adequate notice is cured by subsequent, yet timely disclosure of issues and opposing contentions, which furnish a substantial opportunity to meet opposing claims.

§ 291. Preliminary Stages: Right to Notice of Hearing.

A party affected is ordinarily entitled to be notified of the fact and nature of an intended hearing.⁷ This is of the essence of due process

⁴ *White v. Chin Fong* (1920) 253 U. S. 90, 64 L. Ed. 797, 40 S. Ct. 449.

⁵ *Courier-Journal Co. v. Federal Radio Commission* (1931) 60 App. D. C. 33, 46 F. (2d) 614.

⁶ *Pacific Live Stock Co. v. Lewis* (1916) 241 U. S. 440, 60 L. Ed. 1084, 36 S. Ct. 637.

⁷ Alien Cases.

Lancashire Shipping Co. v. Elting (C. C. A. 2d, 1934) 70 F. (2d) 699, cert. den. 293 U. S. 594, 79 L. Ed. 688, 55 S. Ct. 109.

Federal Radio Commission.

Unity School of Christianity v. Federal Radio Commission (1933) 62 App. D. C. 52, 64 F. (2d) 550, cert. den. 292 U. S. 646, 78 L. Ed. 1496, 54 S. Ct. 779; *Westinghouse Elec. & Mfg. Co. v. Federal Radio Commission* (1931) 60 App. D. C. 53, 47 F. (2d) 415; *Saltzman v. Stromberg-Carlson Tel. Mfg. Co.* (1931) 60 App. D. C. 31, 46 F. (2d) 612.

Federal Trade Commission.

Chamber of Commerce v. Federal Trade Commission (C. C. A. 8th, 1926) 13 F. (2d) 673.

National Labor Relations Board.

Consolidated Edison Co. v. National

Labor Relations Board (1938) 305 U. S. 197, 83 L. Ed. 126, 59 S. Ct. 206.

Railroad Adjustment Board.

Griffin v. Chicago Union Station Co. (D. C. N. D. Ill., E. Div., 1936) 13 F. Supp. 722.

Secretary of the Interior.

United States ex rel. Turner v. Fisher (1911) 222 U. S. 204, 56 L. Ed. 165, 32 S. Ct. 37.

State Agencies.

American Toll Bridge Co. v. Railroad Commission (1939) 307 U. S. 486, 83 L. Ed. 1414, 59 S. Ct. 948; *McGregor v. Hogan* (1923) 263 U. S. 234, 68 L. Ed. 282, 44 S. Ct. 50; *Londoner v. Denver* (1908) 210 U. S. 373, 52 L. Ed. 1103, 28 S. Ct. 708; *Bellingham Bay & B. C. R. Co. v. New Whatcom* (1899) 172 U. S. 314, 43 L. Ed. 460, 19 S. Ct. 205. See *City of El Paso v. Texas Cities Gas Co.* (C. C. A. 5th, 1938) 100 F. (2d) 501, cert. den. (1939) 306 U. S. 650, 83 L. Ed. 1049, 59 S. Ct. 592.

Tariff Commission.

Carl Zeiss, Inc. v. United States (Ct. of Cust. & Pat. App., 1935) 76 F. (2d) 412.

of law.⁸ Although there is no right to a hearing on questions of fact alone at the administrative stage, there must be some opportunity for interested parties to be heard before final disposition. Therefore where no administrative hearing has been provided, a party affected has a right to trial *de novo* of all issues in the reviewing court.⁹

No notice and opportunity to be heard is afforded where a state court dismisses a bill for judicial relief on the ground that the plaintiff failed to exhaust an administrative remedy, when prior thereto the state law had been that no administrative remedy was available.¹⁰

But due process is not denied by lack of notice and hearing before the assessment of property by a tax board, when there is the right to hearing, after notice before arbitrators, one named by the taxpayer, one by the board, and one by the two thus chosen, who make the final assessment.¹¹ And where a taxpayer fails to avail himself of a hearing granted by statute, he cannot thereafter complain of the assessment as unconstitutional.¹² It is not essential to due process of law that the taxpayer be given notice and hearing before the value of his property is originally assessed. It is sufficient if he is granted the right to be heard on the assessment before the valuation is finally determined. The requirement of due process is that after such notice as may be appropriate the taxpayer have opportunity to be heard by giving him the right to appear at some stage of the proceedings before the tax becomes irrevocably fixed.¹³ Due process is denied where, under the same procedure, the arbitrators cannot agree, and no award is made within the statutory time, so that, under state law, the original assessment, made without notice and hearing, becomes final.¹⁴

A state statute providing that an agency is authorized to "require and procure" certain proof must, to avoid unconstitutionality, be construed to mean that due publicity of the agency's proceedings shall be afforded a party affected with opportunity for him to meet adverse evidence.^{14a}

⁸ Garfield v. United States (1908) 211 U. S. 249, 53 L. Ed. 168, 29 S. Ct. 62.

⁹ New Hampshire Fire Ins. Co. v. Murray (C. C. A. 7th, 1939) 105 F. (2d) 212.

¹⁰ Brinkerhoff-Faris Co. v. Hill (1930) 281 U. S. 673, 74 L. Ed. 1107, 50 S. Ct. 451.

¹¹ McGregor v. Hogan (1923) 263 U. S. 234, 68 L. Ed. 282, 44 S. Ct. 50.

¹² McGregor v. Hogan (1923) 263 U. S. 234, 68 L. Ed. 282, 44 S. Ct. 50.

¹³ McGregor v. Hogan (1923) 263 U. S. 234, 68 L. Ed. 282, 44 S. Ct. 50; Londoner v. Denver (1908) 210 U. S. 373, 52 L. Ed. 1103, 28 S. Ct. 708.

¹⁴ McGregor v. Hogan (1923) 263 U. S. 234, 68 L. Ed. 282, 44 S. Ct. 50.

^{14a} Bratton v. Chandler (1922) 260 U. S. 122, 67 L. Ed. 157, 43 Sup. Ct. 43.

§ 292. Persons Entitled to Notice.

All persons whose legal rights will be affected by the administrative proceeding are entitled to notice thereof.¹⁵ It is elementary that it is not within the power of any tribunal to make a binding adjudication of the rights *in personam* of parties not brought before it by due process of law.¹⁶ Yet a proceeding authorized to be taken by the National Labor Relations Board is not for the adjudication of private rights.¹⁷ It has few of the indicia of a private litigation and makes no requirement for the presence in it of any private party other than the employer charged with an unfair labor practice. In a proceeding so narrowly restricted to the protection and enforcement of public rights, there is little scope or need for the traditional rules governing the joinder of parties in litigation determining private rights.¹⁸ However, where the rights involved in litigation arise upon a contract, courts refuse to adjudicate the rights of some of the parties to the contract if the others are not before it.¹⁹ Thus a *bona fide*²⁰ union and its locals who are parties to contracts concerning wages, hours, conditions of work, etc., have a valuable and beneficial interest in the contracts, and are entitled to notice and hearing before the contracts can be set aside by the Board.²¹

But different considerations may apply even in private litigation where the rights asserted arise independently of any contract which an adverse party may have made with another, not a party to the suit, even though their assertion may affect the ability of the former to fulfill his contract. The rights asserted in the suit and those arising upon the contract are distinct and separate, so that the court

¹⁵ Compare § 187 et seq.

¹⁶ National Licorice Co. v. National Labor Relations Board (1940) 309 U. S. 350, 84 L. Ed. 799, 60 S. Ct. 569.

¹⁷ National Licorice Co. v. National Labor Relations Board (1940) 309 U. S. 350, 84 L. Ed. 799, 60 S. Ct. 569.

¹⁸ National Licorice Co. v. National Labor Relations Board (1940) 309 U. S. 350, 84 L. Ed. 799, 60 S. Ct. 569.

¹⁹ National Licorice Co. v. National Labor Relations Board (1940) 309 U. S. 350, 84 L. Ed. 799, 60 S. Ct. 569.

²⁰ Consolidated Edison Co. v. National Labor Relations Board (1938) 305 U. S. 197, 83 L. Ed. 126, 59 S. Ct. 206; National Labor Relations Board

v. Pennsylvania Greyhound Lines (1938) 303 U. S. 261, 82 L. Ed. 831, 58 S. Ct. 571, 115 A. L. R. 307.

Where the union is found upon evidence to be created, fostered, and dominated by the employer within the National Labor Relations Act, § 8(2), 29 USCA 158(2); no notice or hearing is required. Consolidated Edison Co. v. National Labor Relations Board (1938) 305 U. S. 197, 83 L. Ed. 126, 59 S. Ct. 206.

²¹ Consolidated Edison Co. v. National Labor Relations Board (1938) 305 U. S. 197, 83 L. Ed. 126, 59 S. Ct. 206.

may, in a proper case, proceed to judgment without joining other parties to the contract, shaping its decree in such manner as to preserve the rights of those not before it.²² Where the Board's order runs only against the employer and does not prejudge the contract rights of employees, the latter need not be made parties. The situation is similar to that in suits under the Sherman Act or proceedings before the Federal Trade Commission.²³

Whenever the Federal Communications Commission is asked to allow an increase in the power of an existing station, so as to create the possibility of interference with another station on the same frequency, the latter must be given an opportunity to be heard.²⁴

One whose claim to be admitted to practice before an administrative agency is refused is entitled to demand from the agency the right to be heard on the charges against him upon which the refusal was based, even though the matter of admission to practice before the agency is discretionary.²⁵

§ 293. How Notice May Be Given.

Notice is ordinarily given by service of papers stating the time and place of the hearing, and a complaint or other document stating the purpose and claims to be made at the hearing respecting the party affected. Notice may be given personally, by publication,²⁶ by mail,²⁷ by an "order" for a hearing,²⁸ or by a law fixing in advance the time and place of the hearing.²⁹ Where the State Constitution pro-

²² *National Licorice Co. v. National Labor Relations Board* (1940) 309 U. S. 350, 84 L. Ed. 799, 60 S. Ct. 569.

²³ *National Licorice Co. v. National Labor Relations Board* (1940) 309 U. S. 350, 84 L. Ed. 799, 60 S. Ct. 569.

²⁴ *Woodmen of the World Life Ins. Society v. Federal Communications Commission* (1939) 70 App. D. C. 196, 105 F. (2d) 75, cert. den. 308 U. S. 588, 84 L. Ed. 88, 60 S. Ct. 112.

²⁵ *Goldsmith v. United States Board of Tax Appeals* (1926) 270 U. S. 117, 70 L. Ed. 494, 46 S. Ct. 215.

²⁶ See *Londoner v. Denver* (1908) 210 U. S. 373, 52 L. Ed. 1103, 28 S. Ct. 708; *Bellingham Bay & B. C. R. Co. v. New Whatcom* (1899) 172 U. S. 314, 43 L. Ed. 460, 19 S. Ct. 205; *Grand River Dam Authority v. Going*

(*D. C. N. D. Okla.*, 1939) 29 F. Supp. 316.

²⁷ *Unity School of Christianity v. Federal Radio Commission* (1933) 62 App. D. C. 52, 64 F. (2d) 550, cert. den. 292 U. S. 646, 78 L. Ed. 1496, 54 S. Ct. 779.

²⁸ *Charles Noeding Trucking Co. v. United States* (*D. C. D. N. J.*, 1939) 29 F. Supp. 537.

²⁹ *Londoner v. Denver* (1908) 210 U. S. 373, 52 L. Ed. 1103, 28 S. Ct. 708; *Reetz v. Michigan* (1903) 188 U. S. 505, 47 L. Ed. 563, 23 S. Ct. 390; *San Diego Land & Town Co. v. National City* (1899) 174 U. S. 739, 43 L. Ed. 1154, 19 S. Ct. 804; *Kentucky Railroad Tax Cases* (1885) 115 U. S. 321, 29 L. Ed. 414, 6 S. Ct. 57.

vided that municipal boards should fix rates for utilities annually in February, and statutes provided for reports by utility companies to such boards, covering matters of interest to the companies in rate-fixing, sufficient notice of a rate-hearing was given by law.³⁰

§ 294. Adequate Notice.

Adequate notice should be sufficiently definite as fairly and reasonably to acquaint interested parties with the purpose and scope of the intended investigation.³¹ Notice that there would be a hearing to determine "whether a further order" as to a rate schedule should be made is sufficient notice that an existing, or recently superseded schedule, or both, may be found too high.³² Actual notice that a claim may be asserted respecting a union contract, and the right to intervene in administrative proceedings,³³ is not sufficient to put a union on notice in regard to contracts where the complaint does not mention the contracts but merely refers to "relations" between the employer and the union, and the Board's attorney says that the complaint is not directed at the union, that no issue of representation is involved, and that the union is a *bona fide* labor organization.³⁴ Nor is the allegation in the answer that the contracts make the proceeding moot sufficient mention.³⁵ Service of complaint and notice of hearing on a local of the union, which has no members employed by the company does not constitute notice to the union or the other locals involved.³⁶

The fact that there was a prior order in a similar proceeding against the same party which had been vacated and set aside, cannot be held to give notice of the fact and nature of an intended hearing, since the opposing claims in the proceeding resulting in the prior order were no longer in effect.³⁷

The right, in the discretion of an administrative agency, to intervene in a proceeding, is no more a substitute for the service of a

³⁰ San Diego Land & Town Co. v. National City (1899) 174 U. S. 739, 43 L. Ed. 1154, 19 S. Ct. 804.

³¹ Carl Zeiss, Inc. v. United States (Ct. of Cust. & Pat. App., 1935) 76 F. (2d) 412.

³² Tagg Bros. & Moorhead v. United States (1930) 280 U. S. 420, 74 L. Ed. 524, 50 S. Ct. 220.

³³ E. g., under National Labor Relations Act, § 10 (b), 29 USCA 160 (b).

³⁴ Consolidated Edison Co. v. National Labor Relations Board (1938)

305 U. S. 197, 83 L. Ed. 126, 59 S. Ct. 206.

³⁵ Consolidated Edison Co. v. National Labor Relations Board (1938) 305 U. S. 197, 83 L. Ed. 126, 59 S. Ct. 206.

³⁶ Consolidated Edison Co. v. National Labor Relations Board (1938) 305 U. S. 197, 83 L. Ed. 126, 59 S. Ct. 206.

³⁷ Morgan v. United States (1938) 304 U. S. 1, 82 L. Ed. 1139, 58 S. Ct. 773, rehearing denied 304 U. S. 23, 82 L. Ed. 1135, 58 S. Ct. 999.

complaint, notice, and hearing than it would be in any litigation where a person not a party is to be affected by a judgment.³⁸ The defect of lack of notice is not cured where a party intervenes on appeal when that appellate review does not afford opportunity to present all available defenses including lack of proper notice.³⁹

The fact that members of a union which had not been made a party to a hearing, were witnesses in the proceeding does not constitute notice to the union.⁴⁰

Where after grant of permit to build a radio antenna higher than that mentioned in the notice, there was a revocation and regrant after a new hearing as to which protestant-appellant was notified, there was no ultimate denial of a fair hearing.⁴¹

§ 295. — Reasonable Time.

Unless notice is given a reasonable time in advance of the hearing, it is insufficient.⁴² Thus, notice to the attorney of men enrolled as freedmen of the Creek Indians, given a few hours before the hearing of a motion to strike their names on the ground that their enrollment had been secured by perjury, was not such notice as afforded due process.⁴³

Eight days' notice to prepare a defense to charges of unlawful discharge of twelve men was held sufficient, as was six days' notice where only five men had been discharged.⁴⁴ Ten days was held to

³⁸ National Labor Relations Board v. Sterling Electric Motors, Inc. (C. C. A. 9th, 1940) 109 F. (2d) 194.

³⁹ Consolidated Edison Co. v. National Labor Relations Board (1938) 305 U. S. 197, 83 L. Ed. 126, 59 S. Ct. 206.

⁴⁰ National Labor Relations Board v. Sterling Electric Motors, Inc. (C. C. A. 9th, 1940) 109 F. (2d) 194.

⁴¹ Woodmen of the World Life Ins. Society v. Federal Communications Commission (1939) 70 App. D. C. 196, 105 F. (2d) 75, cert. den. 308 U. S. 588, 84 L. Ed. 492, 60 S. Ct. 112.

⁴² National Labor Relations Board.

National Labor Relations Board v. American Potash & Chemical Corp. (C. C. A. 9th, 1938) 98 F. (2d) 488, cert. den. (1939) 306 U. S. 643, 83 L. Ed. 1043, 59 S. Ct. 582.

Secretary of the Interior.

United States ex rel. Turner v. Fisher (1911) 222 U. S. 204, 56 L. Ed. 165, 32 S. Ct. 37.

State Agencies.

Missouri ex rel. Hurwitz v. North (1926) 271 U. S. 40, 70 L. Ed. 818, 46 S. Ct. 384; Bellingham Bay & B. C. R. Co. v. New Whatcom (1899) 172 U. S. 314, 43 L. Ed. 460, 19 S. Ct. 205. See Avery v. Alabama (1940) 308 U. S. 444, 84 L. Ed. 377, 60 S. Ct. 321.

⁴³ United States ex rel. Turner v. Fisher (1911) 222 U. S. 204, 56 L. Ed. 165, 32 S. Ct. 37.

⁴⁴ National Labor Relations Board v. American Potash & Chemical Corp. (C. C. A. 9th, 1938) 98 F. (2d) 488, cert. den. (1939) 306 U. S. 643, 83 L. Ed. 1043, 59 S. Ct. 582.

be sufficient time for notice, by publication, of a hearing for a reassessment for improvements.⁴⁵ Twenty days' written notice, personally served on the person against whom charges are made, containing an exact statement of the charges and the date and place set for hearing, is sufficient in revocation of a license to practice medicine.⁴⁶

Where a continuance, requested before the commencement of the hearing to suit an attorney's convenience, was denied so that the hearing continued for a short period with one party unrepresented by counsel, there was no denial of due process. Substantial rights were not affected.⁴⁷

§ 296. Later Stages of Administrative Proceedings.

No statute or rule imposes upon the Interstate Commerce Commission procedure so exacting as to make fatal mere failure to present the detail of a statement which under the procedure prevailing in courts of law may ordinarily be supplied by amendment or a bill of particulars.⁴⁸ This is true even where such detail is not presented within the jurisdictional statutory period of limitation.⁴⁹ Such a requirement would involve the adoption of a procedure contrary to the long-established practice of the Commission and would defeat the convenient and effective administration of the Act.⁵⁰ Thus a carrier cannot contend that a petition before the Commission for reparation must give not only the names of the parties complainant and of the carrier against which the claim is asserted, but also a detailed description of the specific claims arising out of the several shipments involved.⁵¹ As a bill of particulars is of slight value in a trial by hearings at intervals, its denial cannot prejudice a defendant, and does not constitute a denial of due process.⁵²

⁴⁵ *Bellingham Bay & B. C. R. Co. v. New Whatecom* (1899) 172 U. S. 314, 43 L. Ed. 460, 19 S. Ct. 205.

⁴⁶ *Missouri ex rel. Hurwitz v. North* (1926) 271 U. S. 40, 70 L. Ed. 818, 46 S. Ct. 384.

⁴⁷ *National Labor Relations Board v. American Potash & Chemical Corp.* (C. C. A. 9th, 1938) 98 F. (2d) 488, cert. den. (1939) 306 U. S. 643, 83 L. Ed. 1043, 59 S. Ct. 582.

⁴⁸ *Louisville & N. R. Co. v. Sloss-Sheffield Steel & Iron Co.* (1925) 269

U. S. 217, 70 L. Ed. 242, 46 S. Ct. 73.

⁴⁹ *Louisville & N. R. Co. v. Sloss-Sheffield Steel & Iron Co.* (1925) 269 U. S. 217, 70 L. Ed. 242, 46 S. Ct. 73.

⁵⁰ *Louisville & N. R. Co. v. Sloss-Sheffield Steel & Iron Co.* (1925) 269 U. S. 217, 70 L. Ed. 242, 46 S. Ct. 73.

⁵¹ *Louisville & N. R. Co. v. Sloss-Sheffield Steel & Iron Co.* (1925) 269 U. S. 217, 70 L. Ed. 242, 46 S. Ct. 73.

⁵² *National Labor Relations Board v. Remington Rand, Inc.* (C. C. A. 2d, 1938) 94 F. (2d) 862.

The National Labor Relations Board is not precluded from dealing adequately with unfair labor practices not alleged in the charge but related to those alleged and which grow out of them while the proceeding is pending before the Board. A finding and order dealing with the subsequent practices is not a fatal departure from the charge.⁵³

A party is not denied the right to know and meet opposing claims where the original complaint charged wrongful discharge, a new complaint, presented after all the evidence was in, charged refusal to reemploy, and the agency found wrongful discharge, where all parties to the proceeding knew from the outset that the thing complained of was discrimination against the men in question for alleged union activities.⁵⁴

§ 297. — Right to Notice and Examination of Opposing Evidence.

In adversary proceedings notice must be given, by specific reference, to everything that is to be treated as evidence. This is essential to the preservation of the substantial rights of the parties.⁵⁵ A general notice by an agency that it intends to rely on voluminous annual reports in its files, without specifying and introducing the parts it wishes to treat as evidence, is tantamount to giving no notice whatever.⁵⁶ If there were nothing else objectionable in the record, the taking and recording of the testimony of witnesses whose identity was not disclosed might not render a hearing so unfair as to require reversal, where immediately thereafter evidence of the same character was taken in affidavits open to inspection, and the agency denied that the improper testimony influenced its decision.⁵⁷ Due process is not denied by accepting a state engineer's report, not sworn to by him, as evidence, when the measurements and examinations in the report are made and reported in the discharge of his official duties and under the sanction of his oath of office, timely notice of the date when they are to begin is given to all claimants, and the report

⁵³ *National Licorice Co. v. National Labor Relations Board* (1940) 309 U. S. 350, 84 L. Ed. 799, 60 S. Ct. 569. 1016, 44 S. Ct. 565; *Ex parte Harumi Motoshige* (D. C. S. D. Cal., Cent. Div., 1934) 6 F. Supp. 792.

⁵⁴ *National Labor Relations Board v. Mackay Radio & Telegraph Co.* (1938) 304 U. S. 333, 82 L. Ed. 1381, 58 S. Ct. 904. ⁵⁶ *United States v. Abilene & S. R. Co.* (1924) 265 U. S. 274, 68 L. Ed. 1016, 44 S. C. 565.

⁵⁵ *United States v. Abilene & S. R. Co.* (1924) 265 U. S. 274, 68 L. Ed. 1010, 40 S. Ct. 566. ⁵⁷ *Kwock Jan Fat v. White* (1920)

becomes a public document accessible to all, and is accepted as *prima facie* evidence, but not as conclusive.⁵⁸

The material upon which an agency or other party proposes to rely as established fact, including the data upon which it is based, should be open for inspection by interested parties.⁵⁹ Thus, where a tentative valuation is to be made final by an *ex parte* hearing on protests filed against it, data on which the tentative valuation was made, to be used as evidence in the hearing, ought to be available to the company whose property has been valued, on a proper demand.⁶⁰ Due process is not denied by taking sworn statements of claim *ex parte* in the first instance, when they are then opened to public inspection, opportunity is given for contesting them in a hearing with full opportunity to examine witnesses, including those making the statements, and to produce any appropriate evidence. The fact that the original statements are taken *ex parte* thus becomes of no moment.⁶¹ *Ex parte* testimony and affidavits can be received and considered as evidence, particularly if no objection is made to their reception, and providing the administrative officials are willing to entertain cross-examination of the witnesses and rebutting proofs.⁶² Parties must be given opportunity to inspect documents.⁶³

§ 298. — Right to Examiner's Proposed Report or Proposed Findings.

An examiner's proposed report is not essential in order to know and meet opposing claims, and if the contentions are clearly defined and the parties otherwise fully advised of them, an examiner's report is not required by the Constitution,⁶⁴ the Packers and Stockyards

⁵⁸ Pacific Live Stock Co. v. Lewis (1916) 241 U. S. 440, 60 L. Ed. 1084, 36 S. Ct. 637.

⁵⁹ Crowell v. Benson (1932) 285 U. S. 22, 76 L. Ed. 598, 52 S. Ct. 285; United States ex rel. St. Louis S. W. R. Co. v. Interstate Commerce Commission (1924) 264 U. S. 64, 68 L. Ed. 565, 44 S. Ct. 294. See Interstate Commerce Commission v. Louisville & N. R. Co. (1913) 227 U. S. 88, 57 L. Ed. 431, 33 S. Ct. 185. See also § 314 et seq.

⁶⁰ United States ex rel. St. Louis S. W. R. Co. v. Interstate Commerce Commission (1924) 264 U. S. 64, 68

L. Ed. 565, 44 S. Ct. 294.

⁶¹ Pacific Live Stock Co. v. Lewis (1916) 241 U. S. 440, 60 L. Ed. 1084, 36 S. Ct. 637.

⁶² Mita v. Bonham (C. C. A. 9th, 1928) 25 F. (2d) 11.

⁶³ Interstate Commerce Commission v. Louisville & N. R. Co. (1913) 227 U. S. 88, 57 L. Ed. 431, 33 S. Ct. 185.

⁶⁴ Consolidated Edison Co. v. National Labor Relations Board (1938) 305 U. S. 197, 83 L. Ed. 126, 59 S. Ct. 206; National Labor Relations Board v. Mackay Radio & Telegraph Co. (1938) 304 U. S. 333, 82 L. Ed. 1381, 58 S. Ct. 904; Morgan v. United States

Act,⁶⁵ or the National Labor Relations Act.⁶⁶ Both Constitution and statutes relate to substance, not to form, and parties may be ap-

(1936) 298 U. S. 468, 80 L. Ed. 1288, 56 S. Ct. 906; s. c. (1938) 304 U. S. 1, 82 L. Ed. 1129, 58 S. Ct. 773, rehearing denied 304 U. S. 23, 82 L. Ed. 1135, 58 S. Ct. 999.

⁶⁵ *Morgan v. United States* (1936) 298 U. S. 468, 80 L. Ed. 1288, 56 S. Ct. 906; s. c. (1938) 304 U. S. 1, 82 L. Ed. 1129, 58 S. Ct. 773, rehearing denied 304 U. S. 23, 82 L. Ed. 1135, 58 S. Ct. 999.

"The Government adverts to an observation in our former opinion that, while it was good practice—which we approved—to have the examiner, receiving the evidence in such a case, prepare a report as a basis for exceptions and argument, we could not say that that particular type of procedure was essential to the validity of the proceeding. That is true, for, as we said, what the statute requires 'relates to substance and not form.' Conceivably, the Secretary, in a case the narrow limits of which made such a procedure practicable, might himself hear the evidence and the contentions of both parties and make his findings upon the spot. Again, the evidence being in, the Secretary might receive the proposed findings of both parties, each being notified of the proposals of the other, hear argument thereon and make his own findings. But what would not be essential to the adequacy of the hearing if the Secretary himself makes the findings is not a criterion for a case in which the Secretary accepts and makes as his own the findings which have been prepared by the active prosecutors for the Government, after an *ex parte* discussion with them and without accord- ing any reasonable opportunity to the respondents in the proceeding to know the claims thus presented and to con-

test them. That is more than an irregularity in practice; it is a vital defect." (Mr. Chief Justice Hughes in *Morgan v. United States* (1938) 304 U. S. 1, 21, 22, 82 L. Ed. 1129, 58 S. Ct. 773, rehearing denied 304 U. S. 23, 82 L. Ed. 1135, 58 S. Ct. 999.)

⁶⁶ 29 USCA 151 et seq. Consolidated Edison Co. v. National Labor Relations Board (1938) 305 U. S. 197, 83 L. Ed. 126, 59 S. Ct. 206.

"At the conclusion of the testimony, and prior to oral argument before the examiner, the Board transferred the proceeding to Washington to be further heard before the Board. It denied respondent's motion to re-submit the cause to the trial examiner with directions to prepare and file an intermediate report. In the Circuit Court of Appeals the respondent assigned error to this ruling. It appears that oral argument was had and a brief was filed with the Board after which it made its findings of fact and conclusions of law. The respondent now asserts that the failure of the Board to follow its usual practice of the submission of a tentative report by the trial examiner and a hearing on exceptions to that report deprived the respondent of opportunity to call to the Board's attention the alleged fatal variance between the allegations of the complaint and the Board's findings. What we have said sufficiently indicates that the issues and contentions of the parties were clearly defined and as no other detriment or disadvantage is claimed to have ensued from the Board's procedure the matter is not one calling for a reversal of the order. The Fifth Amendment guarantees no particular form of procedure; it protects substantial rights. Compare *Morgan v. United*

prised of opposing claims by reason of other circumstances.⁶⁷ This rule applies even where there has been variation between the administrative complaint and the administrative findings, provided the issues and contentions of the parties were clearly defined in the administrative proceedings from the standpoint of substance.⁶⁸

It is, however, better practice and often of great value for an examiner's report to be served on parties to an administrative proceeding where the evidence has been taken by an examiner, with opportunity for exceptions and argument thereon.⁶⁹

The failure of an agency to submit proposed findings of fact and conclusions of law, in advance of signature to the party against which an order based on them will run is not necessarily a denial of due process.⁷⁰

§ 299. — Party Not Denied Right by Modification of Order in Its Favor.

The Interstate Commerce Commission, like a court, may, upon its own motion or upon request, correct any order still under its control without notice to a party who cannot possibly suffer by the modification made. This power is, in adversary proceedings, narrowly circumscribed; and its exercise is not to be encouraged.⁷¹ But even if the narrow limits of this power are transcended, if the original order is valid, a party cannot complain that a modification was made without notice to it, when the net effect of the modification is in its favor.

States, 298 U. S. 468, 478. The contention that the respondent was denied a full and adequate hearing must be rejected." (Mr. Justice Roberts in *National Labor Relations Board v. Mackay Radio & Telegraph Co.* (1938) 304 U. S. 333, 350, 351, 82 L. Ed. 1381, 58 S. Ct. 904.)

⁶⁷ *Consolidated Edison Co. v. National Labor Relations Board* (1938) 305 U. S. 197, 83 L. Ed. 126, 59 S. Ct. 206; *Morgan v. United States* (1936) 298 U. S. 468, 80 L. Ed. 1288, 56 S. Ct. 906; s. c. (1938) 304 U. S. 1, 82 L. Ed. 1129, 58 S. Ct. 773, rehearing denied 304 U. S. 23, 82 L. Ed. 1135, 58 S. Ct. 999.

⁶⁸ *Consolidated Edison Co. v. National Labor Relations Board* (1938) 305 U. S. 197, 83 L. Ed. 126, 59 S. Ct.

206; *National Labor Relations Board v. Mackay Radio & Telegraph Co.* (1938) 304 U. S. 333, 82 L. Ed. 1381, 58 S. Ct. 904.

⁶⁹ *Consolidated Edison Co. v. National Labor Relations Board* (1938) 305 U. S. 197, 83 L. Ed. 126, 59 S. Ct. 206; *Morgan v. United States* (1936) 298 U. S. 468, 80 L. Ed. 1288, 56 S. Ct. 906; s. c. (1938) 304 U. S. 1, 82 L. Ed. 1129, 58 S. Ct. 773, rehearing denied 304 U. S. 23, 82 L. Ed. 1135, 58 S. Ct. 999.

⁷⁰ *National Labor Relations Board v. Biles Coleman Lumber Co.* (C. C. A. 9th, 1938) 98 F. (2d) 16.

⁷¹ *Louisville & N. R. Co. v. Sloss-Sheffield Steel & Iron Co.* (1925) 269 U. S. 217, 70 L. Ed. 242, 46 S. Ct. 73.

This is so even if parts of the modification are adverse.⁷² For instance a valid reparation order may, on petition of the original complainant shipper, be reduced, without notice to the carrier, by omitting certain items inadvertently included, even if certain other items, inadvertently omitted, are added at the same time, where the net effect is a reduction in the amount payable by the carrier.⁷³ If lack of notice rendered the later order void, the original order remained in full force.⁷⁴ The petition of the shipper for a modification may be treated as a remittitur by it of part of the amount originally awarded.⁷⁵ The later order acts as an entry of the remittitur, and appropriate amendments in the pleadings may be deemed to have been made in the Supreme Court on appeal.⁷⁶ The contention of the carrier that the later order should be valid in so far as it annuls the prior order, but void in so far as it directs a payment to be made, is without support in reason or authority.⁷⁷

§ 300. — Right to Argument.

A hearing in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument.⁷⁸

No agency need adopt an examiner's recommendations. It is at liberty and is required to reach its own conclusions on the evidence. The absence of an oral argument upon the examiner's report does not deny due process where neither such argument nor any other hearing is requested.⁷⁹

Failure of the administrative agency to hear parties separately in argument is not an abuse of administrative discretion amounting in itself to denial of opportunity to meet opposing claims.⁸⁰ Likewise

⁷² *Louisville & N. R. Co. v. Sloss-Sheffield Steel & Iron Co.* (1925) 269 U. S. 217, 70 L. Ed. 242, 46 S. Ct. 73.

⁷³ *Louisville & N. R. Co. v. Sloss-Sheffield Steel & Iron Co.* (1925) 269 U. S. 217, 70 L. Ed. 242, 46 S. Ct. 73.

⁷⁴ *Louisville & N. R. Co. v. Sloss-Sheffield Steel & Iron Co.* (1925) 269 U. S. 217, 70 L. Ed. 242, 46 S. Ct. 73.

⁷⁵ *Louisville & N. R. Co. v. Sloss-Sheffield Steel & Iron Co.* (1925) 269 U. S. 217, 70 L. Ed. 242, 46 S. Ct. 73.

⁷⁶ *Louisville & N. R. Co. v. Sloss-Sheffield Steel & Iron Co.* (1925) 269 U. S. 217, 70 L. Ed. 242, 46 S. Ct. 73.

⁷⁷ *Louisville & N. R. Co. v. Sloss-Sheffield Steel & Iron Co.* (1925) 269

U. S. 217, 70 L. Ed. 242, 46 S. Ct. 73.

⁷⁸ *Londoner v. Denver* (1908) 210 U. S. 373, 52 L. Ed. 1103, 28 S. Ct. 708. See *Morgan v. United States* (1938) 304 U. S. 1, 82 L. Ed. 1129, 58 S. Ct. 773, rehearing denied 304 U. S. 23, 82 L. Ed. 1135, 58 S. Ct. 999.

⁷⁹ *Federal Radio Commission v. Nelson Bros. Bond & Mtg. Co.* (1933) 289 U. S. 266, 77 L. Ed. 1166, 53 S. Ct. 627, 89 A. L. R. 406.

⁸⁰ *Morgan v. United States* (1936) 298 U. S. 468, 80 L. Ed. 1288, 56 S. Ct. 906; s. c. (1938) 304 U. S. 1, 82 L. Ed. 1129, 58 S. Ct. 773, rehearing denied 304 U. S. 23, 82 L. Ed. 1135, 58 S. Ct. 999.

failure to hear oral argument by parties intervening in administrative proceedings, and otherwise fully participating therein, where there is full notice and opportunity for exceptions and briefs, is not an abuse of discretion.⁸¹

2. Presumptions

§ 301. In General.

Congress may, consistently with the due process clause, create rebuttable presumptions.⁸² A presumption stipulated by statute for an administrative proceeding is valid where it may be rebutted by all relevant and competent evidence.⁸³

A presumption in an administrative proceeding that it shall be prima facie evidence that the burden of such amount of a tax as was borne by the claimant to the extent that the average margin per unit of the commodity processed was lower during the tax period than the average margin was during the period before and after the tax, will not be found to be arbitrary and violative of due process in the absence of proof of the effect of the presumption in relation to the party's business operations. In the absence of those facts, the presumption may work to the party's advantage for all that appears, and the inquiry would be wholly speculative.⁸⁴

However, it has been indicated that if it appears on the face of a statute that a presumption to be applied in an administrative proceeding is entirely arbitrary in its effect, the administrative scheme would not comply with procedural due process, and would be so defective that resort to judicial proceedings could be had without previous resort to the defective administrative procedural scheme.⁸⁵

Where a state commission has lowered intrastate rates, and the new rates are attacked by interstate shippers, the Interstate Commerce Commission must not presume the new rates to be unlawful.⁸⁶

⁸¹ *Woodmen of the World Life Ins. Ass'n v. Federal Radio Commission* (1933) 62 App. D. C. 138, 65 F. (2d) 484.

⁸² *The New England Divisions Case* (1923) 261 U. S. 184, 67 L. Ed. 605, 43 S. Ct. 270.

⁸³ *Anniston Mfg. Co. v. Davis* (1937) 301 U. S. 337, 81 L. Ed. 1143, 57 S. Ct. 816.

⁸⁴ *Anniston Mfg. Co. v. Davis* (1937) 301 U. S. 337, 81 L. Ed. 1143, 57 S. Ct. 816.

⁸⁵ *Anniston Mfg. Co. v. Davis* (1937) 301 U. S. 337, 81 L. Ed. 1143, 57 S. Ct. 816.

⁸⁶ *Ohio v. United States* (1934) 292 U. S. 498, 78 L. Ed. 1388, 54 S. Ct. 792.

Other questions concerning presumptions in administrative proceedings⁸⁷ are to be distinguished from questions concerning presumptions in judicial proceedings on judicial review.⁸⁸

3. Burden of Proof

§ 302. In General.

Congress may, consistently with the due process clause, shift the burden of proof.⁸⁹ It may do so in terms, by declaring what shall be *prima facie* evidence, for instance that evidence typical of joint rates and divisions of carriers as a group shall be *prima facie* evidence before the Interstate Commerce Commission as to the proper divisions of each joint rate of every carrier in the group.⁹⁰ Or it may do so in effect, by imposing the duty of determining divisions, so multitudinous that the task could only be done by such use of typical evidence, since it would be impossible to take specific evidence and make separate adjudication as to each division of each rate; avoiding serious injustice in the application of the typical evidence by a saving clause allowing any one, on proper showing, to except himself from the order.⁹¹ A Treasury Regulation which, at most, affects the burden of proof, is not invalid under the Fifth Amendment. The taxpayer, to avoid the rule of the regulation, is free to introduce any relevant evidence.⁹²

The placing upon a claimant for taxes unconstitutionally collected of the burden of proof of showing that the burden of the amount paid as tax has not been shifted, directly or indirectly, is not inconsistent with due process.⁹³ The placing of any burden of proof in administrative proceedings which has been held to comply with procedural due process requirements in judicial proceedings, is valid.⁹⁴ However, the setting up of a condition of recovery in administrative proceedings which cannot possibly be met such as imposing upon a party

⁸⁷ See § 168.

⁸⁸ See § 754 et seq.

⁸⁹ The New England Divisions Case (1923) 261 U. S. 184, 67 L. Ed. 605, 43 S. Ct. 270.

⁹⁰ The New England Divisions Case (1923) 261 U. S. 184, 67 L. Ed. 605, 43 S. Ct. 270.

⁹¹ The New England Divisions Case

(1923) 261 U. S. 184, 67 L. Ed. 605, 43 S. Ct. 270.

⁹² Helvering v. Rankin (1935) 295 U. S. 123, 79 L. Ed. 1343, 53 S. Ct. 732.

⁹³ Anniston Mfg. Co. v. Davis (1937) 301 U. S. 337, 81 L. Ed. 1143, 57 S. Ct. 816.

⁹⁴ Anniston Mfg. Co. v. Davis (1937) 301 U. S. 337, 81 L. Ed. 1143, 57 S. Ct. 816.

the burden of proving that the burden of taxes paid had not been shifted to others, when the facts, fully disclosed, would afford no basis for any determination as to whether or not the tax burden had been shifted, would violate procedural due process.⁹⁵ The impossibility of making proof, will not, however, be assumed, and the question of whether or not proof was impossible to make will be determined only from evidence adduced in the administrative proceeding. Just as constitutional questions will not be decided hypothetically in judicial proceedings, but only on facts there proven,⁹⁶ the question as to the possibility of making required proof in an administrative proceeding will not be decided hypothetically, but only after full proof has been made in the administrative proceeding so that the facts may be ascertained. Determination of the constitutional question must await ascertainment of the facts in the administrative proceeding, or would otherwise be premature.⁹⁷

A statutory provision which puts the burden of proof upon a carrier complaining to the Interstate Commerce Commission against a rate filed pursuant to its order does not deny due process.⁹⁸

A fair hearing may, however, be denied by misconception of the rules as to burden of proof.⁹⁹

Questions of burden of proof in administrative proceedings are to be distinguished from questions of burden of proof in judicial proceedings on judicial review, which is treated elsewhere.¹

4. The Privilege of Introducing Evidence

§ 303. In General.

The right to a full hearing implies the privilege of introducing all evidence which is competent, material and relevant to the issues, and

⁹⁵ *Anniston Mfg. Co. v. Davis* (1937) 301 U. S. 337, 81 L. Ed. 1143, 57 S. Ct. 816.

⁹⁶ *Borden's Farm Products Co. v. Baldwin* (1934) 293 U. S. 194, 79 L. Ed. 281, 55 S. Ct. 187.

⁹⁷ *Anniston Mfg. Co. v. Davis* (1937) 301 U. S. 337, 81 L. Ed. 1143, 57 S. Ct. 816.

⁹⁸ *United States v. Illinois Cent. R. Co.* (1934) 291 U. S. 457, 78 L. Ed. 909, 54 S. Ct. 471.

⁹⁹ *Ohio v. United States* (1934) 292 U. S. 498, 78 L. Ed. 1388, 54 S. Ct. 792.

¹ See § 759 et seq.

² *Alien Cases.*

Ex parte Ver Pault (C. C. A. 2d, 1936) 86 F. (2d) 113; *Ward v. Flynn ex rel. Yee Gim Lung* (C. C. A. 1st, 1934) 74 F. (2d) 145.

Board of Review (Treasury Department).

Anniston Mfg. Co. v. Davis (1937) 301 U. S. 337, 81 L. Ed. 1143, 57 S. Ct. 816.

Interstate Commerce Commission.

Shields v. Utah Idaho C. R. Co. (1938) 305 U. S. 177, 83 L. Ed. 111, 59 S. Ct. 160; *The Chicago Junction*

argument.² For instance an agency must, in a proper case, receive evidence in support of a claim that certain rates are so low as to be

Case (1924) 264 U. S. 258, 68 L. Ed. 667, 44 S. Ct. 317; *Interstate Commerce Commission v. Louisville & N. R. Co.* (1913) 227 U. S. 88, 57 L. Ed. 431, 33 S. Ct. 185.

National Labor Relations Board.

Consolidated Edison Co. v. National Labor Relations Board (1938) 305 U. S. 197, 83 L. Ed. 126, 59 S. Ct. 206.

Secretary of Agriculture.

See *Morgan v. United States* (1936) 298 U. S. 468, 80 L. Ed. 1288, 56 S. Ct. 906; s. c. (1938) 304 U. S. 1, 82 L. Ed. 1129, 58 S. Ct. 773, rehearing denied 304 U. S. 23, 82 L. Ed. 1135, 58 S. Ct. 999.

State Agencies.

West Ohio Gas Co. v. Public Utilities Commission of Ohio (No. 1) (1935) 294 U. S. 63, 79 L. Ed. 761, 55 S. Ct. 316; *West Ohio Gas Co. v. Public Utilities Commission of Ohio* (No. 2) (1935) 294 U. S. 79, 79 L. Ed. 773, 55 S. Ct. 324; *Chicago, M. & St. P. R. Co. v. Public Utilities Commission* (1927) 274 U. S. 344, 71 L. Ed. 1085, 47 S. Ct. 604; *Londoner v. Denver* (1908) 210 U. S. 373, 52 L. Ed. 1103, 28 S. Ct. 708. See *American Toll Bridge Co. v. Railroad Commission* (1939) 307 U. S. 486, 83 L. Ed. 1414, 59 S. Ct. 948.

Quotations.

"If it is enough that, under such circumstances, an opportunity is given to submit in writing all objections to and complaints of the tax to the Board, then there was a hearing afforded in the case at bar. But we think that something more than that, even in proceedings for taxation, is required by due process of law. Many requirements essential in strictly judicial proceedings may be dispensed with in proceedings of this

nature. But even here a hearing in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument however brief, and, if need be, by proof, however informal. *Pittsburg Etc. Railway Co. v. Backus*, 154 U. S. 421, 426; *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112, 171, et seq. It is apparent that such a hearing was denied to the plaintiffs in error. The denial was by the city council, which, while acting as a board of equalization, represents the State. *Raymond v. Chicago Traction Co.*, 207 U. S. 20. The assessment was therefore void, and the plaintiffs in error were entitled to a decree discharging their lands from a lien on account of it." (Mr. Justice Moody in *Londoner v. Denver* (1908) 210 U. S. 373, 386, 52 L. Ed. 1103, 28 S. Ct. 708.)

"A more serious question grows out of the refusal to receive the testimony of certain witnesses. The taking of evidence began on June 3, 1937, and was continued from time to time until June 23d when the attorney for the Board unexpectedly announced that its case would probably be closed on the following day. At that time the Board completed its proof, with the reservation of one matter, and at the request of the companies' counsel the hearing was adjourned until July 6th in order that Mr. Carlisle, the chairman of the board of trustees of the Consolidated Edison Company, and Mr. Dean, the vice president of one of its affiliates, who were then unavailable, could testify. In response to the examiner's inquiry, the companies' counsel stated that the direct examination of all witnesses on their behalf would not oc-

confiscatory,³ and appropriate rebuttal evidence.⁴ Where a misunderstanding by immigration officials of the essentials of a common law marriage caused them to reject pertinent evidence relating thereto, no full hearing is afforded due to denial of the privilege of introducing relevant evidence.⁵

Where evidence is gathered by a referendum, all proper parties are allowed to vote and all votes are counted, none of the evidence can be disregarded and all improper parties are necessarily excluded.⁶

But a party to an administrative proceeding cannot complain that the exclusion of evidence offered by another party denies him a fair hearing,⁷ especially when that other party appears in support of the agency's order in a suit to set it aside.⁸

copy more than a day. On July 6th the testimony of Mr. Carlisle and Mr. Dean was taken and the companies also offered the testimony of two other witnesses (then present in the hearing room) in relation to the discharge of the employee with respect to whom the complaint had been amended as above stated. The examiner refused to receive this testimony following a ruling of the Board (made in the course of correspondence with the companies' counsel during the adjournment) to the effect that no other testimony than that of Mr. Carlisle and Mr. Dean would be received on the adjourned day. An offer of proof was made which showed the testimony to be highly important with respect to the reasons for the discharge. It was brief and could have been received at once without any undue delay in the closing of the hearing.

"We agree with the Court of Appeals that the refusal to receive the testimony was unreasonable and arbitrary. Assuming, as the Board contends, that it had a discretionary control over the conduct of the proceeding, we cannot but regard this action as an abuse of discretion. But the statute did not leave the petitioners without remedy. The court

below pointed to that remedy, that is, to apply to the Court of Appeals for leave to adduce the additional evidence; on such an application and a showing of reasonable grounds the court could have ordered it to be taken. § 10 (e) (f). Petitioners did not avail themselves of this appropriate procedure." (Mr. Chief Justice Hughes in *Consolidated Edison Co. v. National Labor Relations Board* (1938) 305 U. S. 197, 225, 226, 83 L. Ed. 126, 59 S. Ct. 206.)

³ *Chicago, M. & St. P. R. Co. v. Public Utilities Commission* (1927) 274 U. S. 344, 71 L. Ed. 1085, 47 S. Ct. 604.

⁴ *West Ohio Gas Co. v. Public Utilities Commission of Ohio* (1935) 294 U. S. 63, 79 L. Ed. 761, 55 S. Ct. 316.

⁵ *Ex parte Ver Pault* (C. C. A. 2d, 1936) 86 F. (2d) 113.

⁶ *H. P. Hood & Sons v. United States* (1939) 307 U. S. 588, 83 L. Ed. 1478, 59 S. Ct. 1019.

⁷ *See Moffat Tunnel League v. United States* (1932) 59 F. (2d) 760, aff'd 289 U. S. 113, 77 L. Ed. 1069, 53 S. Ct. 543.

⁸ *See Moffat Tunnel League v. United States* (1932) 59 F. (2d) 760, aff'd 289 U. S. 113, 77 L. Ed. 1069, 53 S. Ct. 543.

Where proper evidence is excluded and the aggrieved party does not take advantage of an available interlocutory judicial procedure specially provided by statute to compel its reception, he cannot later complain of its exclusion as a denial of a fair hearing.⁹

In the event that the agency refuses to receive evidence properly admissible, it may be compelled by mandamus to receive such evidence by mandamus.¹⁰

§ 304. Right of Cross-Examination: Confrontation.

An interested party to an administrative proceeding must have an opportunity to cross-examine witnesses.¹¹ Denial of this constitutional right is not rectified by failure to demand it,¹² although the right can be waived.¹³ The right is accorded to aliens as well as to citizens.¹⁴ However, a fair hearing has not been denied because statements of a witness whom the adverse party had no opportunity to cross-examine are admitted, where such statements are not considered by the agency.¹⁵ Nor is the right denied where circumstances make it necessary to provide for examination and cross-examination of witnesses by deposition elsewhere than at the place of hearing,¹⁶ even where an alien is financially unable to go to the place set for the cross-examination, and so cannot take advantage of the opportunity

⁹ Consolidated Edison Co. v. National Labor Relations Board (1938) 305 U. S. 197, 83 L. Ed. 126, 59 S. Ct. 206.

¹⁰ See § 688 et seq.

¹¹ Alien Cases.

Bhagat Singh v. McGrath (C. C. A. 9th, 1939) 104 F. (2d) 122; Singh v. District Director of Immigration (C. C. A. 9th, 1938) 96 F. (2d) 969; Kishan Singh v. District Director of Immigration (C. C. A. 9th, 1936) 83 F. (2d) 95, cert. den. 299 U. S. 561, 81 L. Ed. 413, 57 S. Ct. 23; Gonzales v. Zurbrick (C. C. A. 6th, 1930) 45 F. (2d) 934; United States ex rel. Ng Wing v. Brough (C. C. A. 2d, 1926) 15 F. (2d) 377; *Svarney v. United States (C. C. A. 8th, 1925) 7 F. (2d) 515.

Interstate Commerce Commission.

Interstate Commerce Commission v. Louisville & N. R. Co. (1913) 227 U.

S. 88, 57 L. Ed. 431, 33 S. Ct. 185; Chicago & E. I. R. Co. v. United States (D. C. N. D. Ill., E. Div., 1930) 43 F. (2d) 987.

Judicial Proceedings.

Alford v. United States (1931) 282 U. S. 687, 75 L. Ed. 624, 51 S. Ct. 218.

¹² Gonzales v. Zurbrick (C. C. A. 6th, 1930) 45 F. (2d) 934.

¹³ Ex parte Singh (D. C. N. D. Cal., S. Div., 1935) 12 F. Supp. 145.

¹⁴ Note the cases cited which involve the Commissioner of Immigration.

¹⁵ Caranica v. Nagle (C. C. A. 9th, 1928) 23 F. (2d) 545, cert. den. 277 U. S. 589, 72 L. Ed. 1002, 48 S. Ct. 437.

¹⁶ Bhagat Singh v. McGrath (C. C. A. 9th, 1939) 104 F. (2d) 122; Singh v. District Director of Immigration (C. C. A. 9th, 1938) 96 F. (2d) 969.

to cross-examine.¹⁷ Where in response to an oral notice that counsel would have ten days within which to notify the immigration authorities in writing whether he wished to cross-examine witnesses at a distant place, counsel wrote that the alien was without funds to go to such place, and waived alien's presence at further hearings, there was a waiver of cross-examination.¹⁸ It has been held that failure by the government to produce a witness for cross-examination by an alien is excused if the witness cannot be found,¹⁹ but such a rule would appear to be susceptible of great abuse and unsupportable on any theory.

Due process is not denied by taking sworn statements of claim *ex parte* in the first instance, when they are then opened to public inspection, opportunity is given for contesting them in a hearing with full opportunity to examine witnesses, including those making the statements, and to produce any appropriate evidence. The fact that the original statements are taken *ex parte* thus becomes of no moment.²⁰

In a deportation proceeding, which, like other administrative proceedings is civil rather than criminal, there is no right to be confronted with witnesses.²¹

§ 305. Rejection or Reception of Incompetent Evidence Not a Denial of Due Process.

There is no denial of a full hearing if an agency excludes irrelevant evidence.²² Thus, in an attempt to prove an administrative construction, evidence showing consistent failure by the agency to take jurisdiction in other cases was properly refused because mere inaction does not constitute administrative construction, and hence the evidence was irrelevant.²³

Conversely, the fact that the agency is not bound by the rules of evidence which would be applicable to trials in court does not in-

¹⁷ *Kishan Singh v. District Director of Immigration* (C. C. A. 9th, 1936) 83 F. (2d) 95, cert. den. 299 U. S. 561, 81 L. Ed. 413, 57 S. Ct. 23.

¹⁸ *Ex parte Singh* (D. C. N. D. Cal., S. Div., 1935) 12 F. Supp. 145.

¹⁹ *Kishan Singh v. Carr* (C. C. A. 9th, 1937) 88 F. (2d) 672; *United States ex rel. Ng Wing v. Brough* (C. C. A. 2d, 1926) 15 F. (2d) 377.

²⁰ *Pacific Live Stock Co. v. Lewis* (1916) 241 U. S. 440, 60 L. Ed. 1084,

36 S. Ct. 637. See also § 297.

²¹ *Bhagat Singh v. McGrath* (C. C. A. 9th, 1939) 104 F. (2d) 122; *Singh v. District Director of Immigration* (C. C. A. 9th, 1938) 96 F. (2d) 969.

²² *Union Stock Yard & Transit Co. v. United States* (1939) 308 U. S. 213, 84 L. Ed. 198, 60 S. Ct. 193.

²³ *Union Stock Yard & Transit Co. v. United States* (1939) 308 U. S. 213, 84 L. Ed. 198, 60 S. Ct. 193. See § 475 et seq.

validate its proceedings, if substantial rights of the parties are not infringed.²⁴ A want of due process is not established by showing merely that incompetent evidence was received and considered.²⁵ A hearing does not cease to be fair, merely because rules of evidence and of procedure applicable in judicial proceedings have not been strictly followed, or because some evidence has been improperly rejected or received.²⁶ The mere admission of matter which under the rules of evidence applicable to judicial proceedings would be deemed incompetent does not invalidate its order.²⁷ Thus, a hearing in a deportation proceeding is not unfair because an inspector attached to his report an official record from another office impeaching one of the alien's witnesses.²⁸ But an administrative agency, though not bound by the rules of evidence which prevail in legal proceedings, is bound by rules of common sense and fair play,²⁹ and it ought not to admit prejudicial evidence which is clearly incompetent.³⁰ Relaxation of the technical rules of evidence is not a license to substitute surmise, suspicion and guess for proof.³¹

§ 306. Right to Compulsory Process: Subpoenas.

Refusal by an agency to issue subpoenas to a party to an administrative proceeding, and discrimination or undue delay in their issuance, sufficient to amount in substance to a denial of his right to introduce evidence, is a denial of a fair hearing.³² But a party claiming violation of his right to compulsory process through application

²⁴ Federal Communications Commission v. Pottsville Broadcasting Co. (1940) 309 U. S. 134, 84 L. Ed. 656, 60 S. Ct. 437; Rochester Telephone Corp. v. United States (1939) 307 U. S. 125, 89 L. Ed. 1147, 59 S. Ct. 754; Crowell v. Benson (1932) 285 U. S. 22, 76 L. Ed. 598, 52 S. Ct. 285.

²⁵ United States ex rel. Vajtauer v. Commissioner of Immigration (1927) 273 U. S. 103, 71 L. Ed. 560, 47 S. Ct. 302; Ex parte Singh (D. C. N. D. Cal., S. Div., 1935) 12 F. Supp. 145.

²⁶ United States ex rel. Bilokumsky v. Tod (1923) 263 U. S. 149, 68 L. Ed. 221, 44 S. Ct. 54; Interstate Commerce Commission v. Louisville & N. R. Co. (1913) 227 U. S. 88, 57 L. Ed. 431, 33 S. Ct. 185. See also § 579.

²⁷ Western Paper Makers' Chemical

Co. v. United States (1926) 271 U. S. 268, 70 L. Ed. 941, 46 S. Ct. 500; United States ex rel. Mastoras v. McCandless (C. C. A. 3d, 1932) 61 F. (2d) 366.

²⁸ Jung See v. Nash (C. C. A. 8th, 1925) 4 F. (2d) 639.

²⁹ B. F. Sturtevant Co. v. Commissioner of Internal Revenue (C. C. A. 1st, 1935) 75 F. (2d) 316.

³⁰ Chicago & E. I. R. Co. v. United States (D. C. N. D. Ill., E. Div., 1930) 43 F. (2d) 987.

³¹ National Labor Relations Board v. Empire Furniture Corp. (C. C. A. 6th, 1939) 107 F. (2d) 92.

³² National Labor Relations Board.

Inland Steel Co. v. National Labor Relations Board (C. C. A. 7th, 1940) 109 F. (2d) 9. See North Whittier

of an administrative rule regulating the issuance of subpoenas, must specify the respects in which he has been prejudiced.³³

Where, in a proceeding to revoke a license to practice medicine, depositions, later read at the hearing, are taken before officers authorized to compel witnesses to attend and give testimony, a refusal to subpoena the witnesses to appear before the board conducting the hearing does not deny due process.³⁴

§ 307. Right to Interpreter.

Failure to provide a competent interpreter, where the alien in a deportation proceeding does not understand English, is a denial of a fair hearing.³⁵

§ 308. Alien Cases.

Administration of the immigration laws was previously committed to the Department of Labor.³⁶ The admission or exclusion of an alien was made a matter for decision by officers of the Department of Labor, a board of special inquiry in the first instance, and the Secretary of Labor on appeal.³⁷ It was provided by statute that the decision of a board of special inquiry should be based upon the certificate of the examining medical officer, and should be final as to the rejection of aliens affected with tuberculosis in any form or with a loathsome or dangerous contagious disease, or an appropriate mental or physical disability.³⁸ The rule in the first circuit is that evidence other than the medical certificate may be introduced on the question of disease.³⁹ In the second circuit, no other evidence may be intro-

Heights Citrus Ass'n v. National Labor Relations Board (C. C. A. 9th, 1940) 109 F. (2d) 76, cert. den. 310 U. S. 632, 84 L. Ed. 904, 60 S. Ct. 1075.

State Agencies.

Missouri ex rel. Hurwitz v. North (1926) 271 U. S. 40, 70 L. Ed. 818, 46 S. Ct. 384. See Louisville & N. R. Co. v. Fynn (1915) 235 U. S. 601, 59 L. Ed. 379, 35 S. Ct. 146.

Law Review Article.

See note, "Subpoenas and Due Process in Administrative Hearings" (1940) 53 Harv. L. Rev. 842.

³³ North Whittier Heights Citrus Ass'n v. National Labor Relations Board (C. C. A. 9th, 1940) 109 F. (2d) 76, cert. den. 310 U. S. 632, 84 L. Ed.

904, 60 S. Ct. 1075.

³⁴ Missouri ex rel. Hurwitz v. North (1926) 271 U. S. 40, 70 L. Ed. 818, 46 S. Ct. 384.

³⁵ Gonzales v. Zurbrick (C. C. A. 6th, 1930) 45 F. (2d) 934.

³⁶ See United States ex rel. Frumcair v. Reimer (D. C. S. D. N. Y., 1938) 25 F. Supp. 552. See § 97.

³⁷ See United States ex rel. Frumcair v. Reimer (D. C. S. D. N. Y., 1938) 25 F. Supp. 552.

³⁸ 8 USCA 153. See United States ex rel. Frumcair v. Reimer (D. C. S. D. N. Y., 1938) 25 F. Supp. 552.

³⁹ See U. S. ex rel. Frumcair v. Reimer (D. C. S. D. N. Y., 1938) 25 F. Supp. 552 and cases cited.

duced.⁴⁰ There would appear to be no supportable basis for the rule in the second circuit, since it amounts to a plain deprivation of the right to introduce evidence upon the very question upon which his admission or exclusion depends, in the face of an admission that the alien is entitled to a "fair hearing."⁴¹ In effect it makes the admission or exclusion of an alien depend upon the whim of the examining medical officer.⁴²

An administrative determination based on the doctor's certificate alone will be reversed where evidence which might have influenced his opinion was excluded.⁴³

5. The One Who Hears Must Be Unbiased

§ 309. In General.

The one who hears must be unbiased. A hearing by a biased judge is not in conformity with due process of law, which implies a tribunal both impartial and mentally competent to afford a hearing.⁴⁴ All officers acting in a judicial or quasi-judicial capacity are disqualified by an interest in the controversy.⁴⁵ These rules apply to administrative agencies and their examiners or hearing officers which conduct adversary proceedings, as such proceedings resemble judicial trials.⁴⁶

⁴⁰ *United States ex rel. Frumcair v. Reimer* (D. C. S. D. N. Y., 1938) 25 F. Supp. 552.

⁴¹ *United States ex rel. Frumcair v. Reimer* (D. C. S. D. N. Y., 1938) 25 F. Supp. 552.

⁴² See *Lloyd Sabauda Societa Anonima v. Elting* (1932) 287 U. S. 329, 77 L. Ed. 341, 53 S. Ct. 167.

⁴³ *Lloyd Sabauda Societa Anonima v. Elting* (1932) 287 U. S. 329, 77 L. Ed. 341, 53 S. Ct. 167.

⁴⁴ *Jordan v. Massachusetts* (1912) 225 U. S. 167, 56 L. Ed. 1038, 32 S. Ct. 651. See Mr. Justice Brandeis dissenting in *St. Joseph Stock Yards Co. v. United States* (1936) 298 U. S. 38, 73, 80 L. Ed. 1033, 59 S. Ct. 720. 28 USCA 25 provides for removal of a judge from a particular action or proceeding upon the filing of an affidavit of personal bias or prejudice.

⁴⁵ *Tumey v. Ohio* (1927) 273 U. S. 510, 71 L. Ed. 749, 47 S. Ct. 437, 50 A. L. R. 1243.

⁴⁶ *Inland Steel Co. v. National Labor Relations Board* (C. C. A. 7th, 1940) 109 F. (2d) 9; *Cupples Co. Mfrs. v. National Labor Relations Board* (C. C. A. 8th, 1939) 106 F. (2d) 100; *Montgomery Ward & Co. v. National Labor Relations Board* (C. C. A. 8th, 1939) 103 F. (2d) 147. But see *Montana Power Co. v. Public Service Commission* (D. C. Mont., 1935) 12 F. Supp. 946.

"The commission is to be non-partisan; and it must, from the very nature of its duties, act with entire impartiality. It is charged with the enforcement of no policy except the policy of law. Its duties are neither political nor executive, but predominantly quasi-judicial and quasi-legislative. Like the Interstate Commerce Commission, its members are called upon to exercise the trained judgment of a body of experts 'appointed by law and informed by experience.' *Illinois Central R. Co. v.*

Thus conduct of an administrative hearing must conform to the essential requirements of fair play fundamental to both judicial and quasi-judicial administrative proceedings.⁴⁷ A full or fair hearing requires a trial by a tribunal free from bias and prejudice and imbued with a desire to accord equal consideration to the parties.⁴⁸ If the record discloses omissions, unfair restriction of examination and cross-examination by counsel, hostile attitude toward witnesses favoring one side, or other bias on the part of the examiner, in the substantial sense, a fair hearing has not been accorded.⁴⁹ A hostile attitude on the part of the examiner, shown in discriminatory cross-examination of witnesses, attempted intimidation of witnesses or counsel, or refusal to permit a full record of the hearing to be made, may make the hearing unfair and result in a denial of due process.⁵⁰ However, the fact that a trial examiner cross-examines witnesses and makes a few remarks tinged with sarcasm not appropriate to a judicial officer will not necessarily make the hearing unfair in the constitutional sense.⁵¹ An examiner should interrogate witnesses as an impartial participant and not as an advocate endeavoring to establish one side or the other of the controversy before him.⁵² If a trial examiner will only keep in mind that the proper exercise of his functions requires open-mindedness, fairness and impartiality and if he will, within reasonable limits, permit each of the parties to the proceeding before him to prove his own case, in his own way, by his own counsel, he will save himself from criticism, and avoid furnishing any basis for the charge that the hearing was unfair and that bias was shown.⁵³ However, an alien who was represented by an attorney and who presented all his witnesses was accorded a fair hearing, not-

Interstate Commerce Comm'n, 206 U. S. 441, 454; *Standard Oil Co. v. United States*, 283 U. S. 235, 238-239." (Mr. Justice Sutherland in *Humphrey v. United States* (1935) 295 U. S. 602, 624, 79 L. Ed. 1611, 55 S. Ct. 869.)

⁴⁷ *Inland Steel Co. v. National Labor Relations Board* (C. C. A. 7th, 1940) 109 F. (2d) 9.

⁴⁸ *Inland Steel Co. v. National Labor Relations Board* (C. C. A. 7th, 1940) 109 F. (2d) 9; *Montgomery Ward & Co. v. National Labor Relations Board* (C. C. A. 8th, 1939) 103 F. (2d) 147.

⁴⁹ *Montgomery Ward & Co. v. Na-*

tional Labor Relations Board (C. C. A. 8th, 1939) 103 F. (2d) 147.

⁵⁰ *Inland Steel Co. v. National Labor Relations Board* (C. C. A. 7th, 1940) 109 F. (2d) 9.

⁵¹ *National Labor Relations Board v. Stackpole Carbon Co.* (C. C. A. 3d, 1939) 105 F. (2d) 167, cert. den. 308 U. S. 605, 84 L. Ed. 506, 60 S. Ct. 142.

⁵² *Montgomery Ward & Co. v. National Labor Relations Board* (C. C. A. 8th, 1939) 103 F. (2d) 147.

⁵³ *Cupples Co. Mfrs. v. National Labor Relations Board* (C. C. A. 8th, 1939) 106 F. (2d) 100.

withstanding that the immigration inspector falsely accused the attorney of unbecoming conduct and displayed a hostile attitude toward the alien and the attorney, where the record did not warrant a finding that the inspector had prejudged the case, and where a board of review carefully weighing the evidence uninfluenced by the dispute, reached the same conclusion as the inspector.⁵⁴

The fact that an agency dealing with taxation matters is composed of members, officers or employees of the Treasury Department designated by the Secretary of the Treasury, is not inconsistent with procedural due process.⁵⁵

However, it has been held that a hearing before a prejudiced member of an administrative agency is not a denial of due process, if the statute provides for judicial review of the particular order made or agreed to by the prejudiced officer.⁵⁶ The fact that the members of an agency were appointed by a governor who said he would remove them unless they lowered public utility rates, has been held not to render the agency's orders, lowering rates, a denial of due process.⁵⁷

It is apparently the law that the fact that an administrative agency both prosecutes and adjudicates—acts as “prosecutor, judge and jury”—does not violate due process of law,⁵⁸ despite the traditional principle that no person shall be judge in his own cause.⁵⁹

Aside from questions of due process, the importance of a competent and impartial hearing officer is paramount in the orderly execution of an administrative scheme.⁶⁰

⁵⁴ *In re Gomes* (D. C. Mass., 1939) 27 F. Supp. 419.

⁵⁵ *Anniston Mfg. Co. v. Davis* (1937) 301 U. S. 337, 81 L. Ed. 1143, 57 S. Ct. 816.

⁵⁶ *Montana Power Co. v. Public Service Commission* (D. C. Mont., 1935) 12 F. Supp. 946.

⁵⁷ *Georgia Continental Telephone Co. v. Georgia Public Service Commission* (D. C. N. D. Ga., 1934) 8 F. Supp. 434.

⁵⁸ *J. W. Kobi Co. v. Federal Trade Commission* (C. C. A. 2d, 1927) 23 F. (2d) 41. But see *Tumey v. Ohio* (1927) 273 U. S. 510, 71 L. Ed. 749, 47 S. Ct. 437, 50 A. L. R. 1243.

⁵⁹ *Chester C. Fosgate Co. v. Kirkland* (D. C. S. D. Fla., 1937) 19 F. Supp. 152.

⁶⁰ “In those agencies where the hearing officer plays, and is known to play, an important part in the disposition of the case, he exercises real authority in keeping the testimony to the relevant and important issues, reducing its volume and sharpening the issues. Where this is not the case, the testimony wanders and the proceeding loses direction. Evidence is admitted ‘for what it is worth’ or ‘for the information of’ the agency, time is lost and expense increased.” Final Report of the Attorney General’s Committee on Administrative Procedure (1941), pp. 45, 46.

6. The One Who Decides Must Hear

§ 310. In General.

In order to accord a fair hearing, the administrative agent to whom the power of decision is committed must itself hear the evidence and argument.⁶¹ This requirement is necessary for proper exercise, in conformity with the judicial tradition, of the important quasi-judicial authority conferred.⁶² Thus where the agency with the authority to hear and determine gives only casual attention to the case, no full hearing has been accorded.⁶³

§ 311. Assistance from Subordinates.

For an administrative agency to "hear" evidence, it is not necessary that the agency, either an individual or all members of a group, be personally present when oral testimony is taken and exhibits received.⁶⁴ And the rule that the one who decides must hear does not

61 Alien Cases.

United States ex rel. Ohm v. Perkins (C. C. A. 2d, 1935) 79 F. (2d) 533.

Federal Radio Commission.

Federal Radio Commission v. Nelson Bros. Bond & Mtg. Co. (1933) 289 U. S. 266, 77 L. Ed. 1166, 53 S. Ct. 627, 89 A. L. R. 406.

Judicial Proceedings.

See United States v. Nugent (C. C. A. 6th, 1938) 100 F. (2d) 215, cert. den. 306 U. S. 648, 83 L. Ed. 1046, 59 S. Ct. 591.

National Labor Relations Board.

National Labor Relations Board v. Botany Worsted Mills, Inc. (C. C. A. 3d, 1939) 106 F. (2d) 263.

Secretary of Agriculture.

* Morgan v. United States (1936) 298 U. S. 468, 80 L. Ed. 1288, 56 S. Ct. 906; s. c. (1938) 304 U. S. 1, 82 L. Ed. 1129, 58 S. Ct. 773, rehearing denied 304 U. S. 23, 82 L. Ed. 1135, 58 S. Ct. 999.

⁶² Morgan v. United States (1936) 298 U. S. 468, 80 L. Ed. 1288, 56 S. Ct. 906; s. c. (1938) 304 U. S. 1, 82 L. Ed. 1129, 58 S. Ct. 773, rehearing denied 304 U. S. 23, 82 L. Ed. 1135, 58 S. Ct. 999.

⁶³ Morgan v. United States (D. C. W. D. Mo., W. Div., 1937) 23 F. Supp. 380, rev'd 304 U. S. 1, 82 L. Ed. 1129, 58 S. Ct. 773, rehearing denied 304 U. S. 23, 82 L. Ed. 1135, 58 S. Ct. 999.

⁶⁴ Federal Communications Commission.

Eastland Co. v. Federal Communications Commission (1937) 67 App. D. C. 316, 92 F. (2d) 467, cert. den. 302 U. S. 735, 82 L. Ed. 568, 58 S. Ct. 120.

National Labor Relations Board.

Consolidated Edison Co. v. National Labor Relations Board (1938) 305 U. S. 197, 83 L. Ed. 126, 59 S. Ct. 206; Inland Steel Co. v. National Labor Relations Board (C. C. A. 7th, 1939) 105 F. (2d) 246.

Secretary of Agriculture.

* Morgan v. United States (1936) 298 U. S. 468, 80 L. Ed. 1288, 56 S. Ct. 906; s. c. (1938) 304 U. S. 1, 82 L. Ed. 1129, 58 S. Ct. 773, rehearing denied 304 U. S. 23, 82 L. Ed. 1135, 58 S. Ct. 999; Morgan v. United States (1937) 23 F. Supp. 380, rev'd 304 U. S. 1, 82 L. Ed. 1129, 58 S. Ct. 773, rehearing denied 304 U. S. 23, 82 L. Ed. 1135, 58 S. Ct. 999.

deprive the administrative agency of the aid of assistants, when the aid is of a preliminary character directed to appropriate presentation of the evidence and arguments to the agency itself for its determination,⁶⁵ similar to that afforded by a master to a chancellor, although the statute does not plainly say so.⁶⁶ Assistants for such purposes must, however, be qualified as impartial and competent. If it be shown that they are not, no full hearing has been accorded.⁶⁷

Thus assistants may prosecute inquiries, examiners may take evidence, and evidence adduced may be sifted and analyzed by competent and impartial subordinates, and argument may be oral or written, for the rule that the one who decides must hear is not a technical rule, but part of the rule of substance requiring a full hearing in the judicial sense.⁶⁸ Preparation of findings of fact and conclusions of law by employees or subordinates of agency does not constitute a denial of due process.⁶⁹ The fact that the greater part of the testimony is taken before a single inspector and introduced before the board, where

⁶⁵ National Labor Relations Board v. Biles Coleman Lumber Co. (C. C. A. 9th, 1938) 98 F. (2d) 16.

⁶⁶ National Labor Relations Board v. Lane Cotton Mills Co. (C. C. A. 5th, 1940) 108 F. (2d) 568, rehearing denied 111 F. (2d) 814; National Labor Relations Board v. Cherry Cotton Mills (C. C. A. 5th, 1938) 98 F. (2d) 444, rehearing denied 98 F. (2d) 1021. See *Morgan v. United States* (1936) 298 U. S. 468, 80 L. Ed. 1288, 56 S. Ct. 906; s. c. (1938) 304 U. S. 1, 82 L. Ed. 1129, 58 S. Ct. 773, rehearing denied 304 U. S. 23, 82 L. Ed. 1135, 58 S. Ct. 999.

⁶⁷ See § 309.

⁶⁸ Consolidated Edison Co. v. National Labor Relations Board (1938) 305 U. S. 197, 83 L. Ed. 126, 59 S. Ct. 206; *Morgan v. United States* (1936) 298 U. S. 468, 80 L. Ed. 1288, 56 S. Ct. 906; s. c. (1938) 304 U. S. 1, 82 L. Ed. 1129, 58 S. Ct. 773, rehearing denied 304 U. S. 23, 82 L. Ed. 1135, 58 S. Ct. 999; *Cupples Co. Mfrs. v. National Labor Relations Board* (C. C. A. 8th, 1939) 103 F. (2d) 953.

"This necessary rule does not preclude practicable administrative pro-

cedure in obtaining the aid of assistants in the department. Assistants may prosecute inquiries. Evidence may be taken by an examiner. Evidence thus taken may be sifted and analyzed by competent subordinates. Argument may be oral or written. The requirements are not technical. But there must be a hearing in a substantial sense. And to give the substance of a hearing, which is for the purpose of making determinations upon evidence, the officer who makes the determinations must consider and appraise the evidence which justifies them. That duty undoubtedly may be an onerous one, but the performance of it in a substantial manner is inseparable from the exercise of the important authority conferred." (Mr. Chief Justice Hughes in *Morgan v. United States* (1936) 298 U. S. 468, 481, 482, 80 L. Ed. 1288, 56 S. Ct. 906; s. c. (1938) 304 U. S. 1, 82 L. Ed. 1129, 58 S. Ct. 773, rehearing denied 304 U. S. 23, 82 L. Ed. 1135, 58 S. Ct. 999.

⁶⁹ National Labor Relations Board v. Biles Coleman Lumber Co. (C. C. A. 9th, 1938) 98 F. (2d) 16.

the statute⁷⁰ provides that the decision be rendered "solely upon evidence adduced before the Board" does not make the hearing invalid.⁷¹ There is no suggestion in the act that evidence adduced before the board must be taken in its presence. Evidence properly taken before an inspector—which has substantially the same effect as a deposition taken in an ordinary case—may be introduced before the board and considered by it.⁷²

It is important, nevertheless, to an orderly administration of the administrative process, that the evidence be analyzed and summarized by the hearing officer who heard the witnesses.⁷³

§ 312. Familiarity with the Evidence and Argument.

The requirement places no physical duty on an administrative agency to hear or read all evidence or oral arguments. Such a burden would make impossible, as a practical matter under modern conditions, administration of the legislative powers conferred.⁷⁴ Thus it is not necessarily incumbent upon an administrative agency or any member thereof to read all the testimony or exhibits received in evidence. The requirements in this respect may depend upon the circumstances of each case.⁷⁵ Where the agency hears oral argument by opposing counsel and receives briefs in support of their respective

⁷⁰ Immigration Act of 1917, 8 USCA 173 et seq.

⁷¹ *Quon Quon Poy v. Johnson* (1927) 273 U. S. 352, 71 L. Ed. 680, 47 S. Ct. 346.

⁷² *Quon Quon Poy v. Johnson* (1927) 273 U. S. 352, 71 L. Ed. 680, 47 S. Ct. 346.

⁷³ "Also, if the hearing officer is not to play an important part in the decision of the case, other persons must. The agency heads cannot read the voluminous records and winnow out the essence of them. Consequently, this task must be delegated to subordinates. Competent as these anonymous reviewers or memorandum writers may be, their entrance makes for loss of confidence. Parties have a sound desire to make their arguments and present their evidence, not to a monitor, but to the officer who must in the first instance decide or recom-

mend the decision. In many agencies attorneys rarely exercise the privilege of arguing to the hearing officer. They have no opportunity to argue to the record analysts and reviewers who have not heard the evidence but whose summaries may strongly affect the final result." Final Report of the Attorney General's Committee on Administrative Procedure (1941), p. 46.

⁷⁴ *Morgan v. United States* (D. C. W. D. Mo., W. Div., 1937) 23 F. Supp. 380, rev'd 304 U. S. 1, 82 L. Ed. 1129, 58 S. Ct. 773, rehearing denied 304 U. S. 23, 82 L. Ed. 1135, 58 S. Ct. 999.

⁷⁵ *Inland Steel Co. v. National Labor Relations Board* (C. C. A. 7th, 1939) 105 F. (2d) 246. See *Eastland Co. v. Federal Communications Commission* (1937) 67 App. D. C. 316, 92 F. (2d) 467, cert. den. 302 U. S. 735, 82 L. Ed. 568, 58 S. Ct. 120.

positions, it may be concluded that the agency thus acquired a knowledge of the facts relevant to the issues in dispute which might well have dispensed with the necessity for a reading of the testimony.⁷⁶ A hearing was held to have been fair where one of the members of the agency heard the evidence, and afterwards, as part of the agency board, passed on it. Where briefs were filed, the fact that such member was not present at the oral argument did not render the hearing unfair.⁷⁷ Where oral argument was heard by a board of three, two of whom, with a third who had not heard the argument, rendered the decision, there was no denial of fair hearing.⁷⁸

An administrative agency's determinations are not invalid because of a change in personnel after the hearing of oral testimony, where the new commissioners considered stenographic reports of the testimony,⁷⁹ or where there is no showing that at the last hearing all testimony taken at earlier hearings was not considered by the agency in disposing of the case.⁸⁰

Depositions may be taken by officers authorized to compel a witness to attend and give testimony, and read at the hearing.⁸¹

§ 313. Governmental Department as Such May Not Hear and Determine.

Administrative authority to hear and determine is given to an agency as a legislative agent of Congress, and the procedure of hearing and determining is not one of ordinary administration but is a judicial one looking to legislative action.⁸² Such authority may not

⁷⁶ *Inland Steel Co. v. National Labor Relations Board* (C. C. A. 7th, 1939) 105 F. (2d) 246. See *Morgan v. United States* (D. C. W. D. Mo., W. Div., 1937) 23 F. Supp. 380, rev'd 304 U. S. 1, 82 L. Ed. 1129, 58 S. Ct. 773, rehearing denied 304 U. S. 23, 82 L. Ed. 1135, 58 S. Ct. 999.

⁷⁷ *J. W. Kobi Co. v. Federal Trade Commission* (C. C. A. 2d, 1927) 23 F. (2d) 41.

⁷⁸ *Visceglia v. United States* (D. C. S. D. N. Y., 1938) 24 F. Supp. 355.

⁷⁹ *Eastland Co. v. Federal Communications Commission* (1937) 67 App. D. C. 316, 92 F. (2d) 467, cert. den. 302 U. S. 735, 82 L. Ed. 568, 58 S. Ct. 120; *United States ex rel. Chin Cheung Nai*

v. Corsi (D. C. S. D. N. Y., 1932) 55 F. (2d) 360.

⁸⁰ *Hom Moon Ong v. Nagle* (C. C. A. 9th, 1929) 32 F. (2d) 470.

⁸¹ *Missouri ex rel. Hurwitz v. North* (1926) 271 U. S. 40, 70 L. Ed. 818, 46 S. Ct. 384.

⁸² *Morgan v. United States* (1936) 298 U. S. 468, 80 L. Ed. 1288, 56 S. Ct. 906; s. e. (1938) 304 U. S. 1, 82 L. Ed. 1129, 58 S. Ct. 773, rehearing denied 304 U. S. 23, 82 L. Ed. 1135, 58 S. Ct. 999; *Morgan v. United States* (D. C. W. D. Mo., W. Div., 1937) 23 F. Supp. 380, rev'd 304 U. S. 1, 82 L. Ed. 1129, 58 S. Ct. 773, rehearing denied 304 U. S. 23, 82 L. Ed. 1135, 58 S. Ct. 999.

be committed to a governmental department as a department in the administrative or executive sense. Such delegation of authority would enable one individual in the department to hear and arrive at conclusions of fact, and another individual in the department to overrule those conclusions or for reasons of "policy" to announce entirely different ones. Accordingly the Packers and Stockyards Act⁸³ does not give authority to the Department of Agriculture as a department in the administrative sense, but to the Secretary himself as a legislative agent.⁸⁴

7. Duty of Deciding in Accordance with Evidence

§ 314. In General.

The right to a full hearing implies a duty on the part of the administrative agency to decide in accordance with the evidence rather than arbitrarily; and conversely an agency may not treat as evidence anything which is not introduced before it as such, or base its findings upon matters not shown by evidence adduced before it.⁸⁵ The one

⁸³ 7 USCA 211.

⁸⁴ *Morgan v. United States* (1936) 298 U. S. 468, 80 L. Ed. 1288, 56 S. Ct. 906; s. c. (1938) 304 U. S. 1, 82 L. Ed. 1129, 58 S. Ct. 773, rehearing denied 304 U. S. 23, 82 L. Ed. 1135, 58 S. Ct. 999.

⁸⁵ Alien Cases.

Lloyd Sabando Societa Anonima v. Elting (1932) 287 U. S. 329, 77 L. Ed. 341, 53 S. Ct. 167.

Board of Review (Treasury Department).

Anniston Mfg. Co. v. Davis (1937) 301 U. S. 337, 81 L. Ed. 1143, 57 S. Ct. 816.

Federal Radio Commission.

Federal Radio Commission v. Nelson Bros. Bond & Mtg. Co. (1933) 289 U. S. 266, 77 L. Ed. 1166, 53 S. Ct. 627, 89 A. L. R. 406; *Saltzman v. Stromberg-Carlson Telephone Mfg. Co.* (1931) 60 App. D. C. 31, 46 F. (2d) 612.

Interstate Commerce Commission.

Shields v. Utah Idaho C. R. Co. (1938) 305 U. S. 177, 83 L. Ed. 111,

59 S. Ct. 160; * *United States v. Abilene & S. R. Co.* (1924) 265 U. S. 274, 68 L. Ed. 1016, 44 S. Ct. 565; *The Chicago Junction Case* (1924) 264 U. S. 258, 68 L. Ed. 667, 44 S. Ct. 317; *Missouri Pac. R. Co. v. United States* (D. C. E. D. Ky., 1933) 4 F. Supp. 449, aff'd per curiam 293 U. S. 524, 79 L. Ed. 636, 55 S. Ct. 121. See *Interstate Commerce Commission v. Louisville & N. R. Co.* (1913) 227 U. S. 88, 57 L. Ed. 431, 33 S. Ct. 185. *National Labor Relations Board.*

Consolidated Edison Co. v. National Labor Relations Board (1938) 305 U. S. 197, 83 L. Ed. 126, 59 S. Ct. 206. *National Mediation Board.*

Brotherhood of Railroad Trainmen v. National Mediation Board (1936) 66 App. D. C. 375, 88 F. (2d) 757. *Secretary of Agriculture.*

* *Morgan v. United States* (1936) 298 U. S. 468, 80 L. Ed. 1288, 56 S. Ct. 906; s. c. (1938) 304 U. S. 1, 82 L. Ed. 1129, 58 S. Ct. 773, rehearing denied 304 U. S. 23, 82 L. Ed. 1135, 58 S. Ct. 999.

who decides is bound in good conscience to consider evidence, to be guided by that alone, and to reach his conclusion uninfluenced by

State Agencies.

* Railroad Commission of California v. Pacific Gas & Electric Co. (1938) 302 U. S. 388, 82 L. Ed. 319, 58 S. Ct. 334; * Ohio Bell Telephone Co. v. Public Utilities Commission (1937) 301 U. S. 292, 81 L. Ed. 1093, 57 S. Ct. 724; Western Union Telegraph Co. v. Industrial Commission of Minn. (D. C. Minn., Fourth Div., 1938) 24 F. Supp. 370. See Ohio Utilities Co. v. Public Utilities Commission (1925) 267 U. S. 359, 69 L. Ed. 656, 45 S. Ct. 259.

Workmen's Compensation Cases.

Crowell v. Benson (1932) 285 U. S. 22, 76 L. Ed. 598, 52 S. Ct. 285.

Quotations.

"1. But the statute gave the right to a full hearing, and that conferred the privilege of introducing testimony, and at the same time imposed the duty of deciding in accordance with the facts proved. A finding without evidence is arbitrary and baseless. And if the Government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our Government. It would mean that where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficently exercised in one case, could be injuriously exerted in another; is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power." (Mr. Justice Lamar in *Interstate Commerce Commission v. Louisville & N. R. Co.* (1913) 227 U. S. 88, 91, 57 L. Ed. 431, 33 S. Ct. 185.)

"First: The fundamentals of a trial were denied to the appellant when rates previously collected were ordered to be refunded upon the strength of evidential facts not spread upon the record.

"The Commission had given notice that the value of the property would be fixed as of a date certain. Evidence directed to the value at that time had been laid before the triers of the facts in thousands of printed pages. To make the picture more complete, evidence had been given as to the value at cost of additions and retirements. Without warning or even the hint of warning that the case would be considered or determined upon any other basis than the evidence submitted, the Commission cut down the values for the years after the date certain upon the strength of information secretly collected and never yet disclosed. The company protested. It asked disclosure of the documents indicative of price trends, and an opportunity to examine them, to analyze them, to explain and to rebut them. The response was a curt refusal. Upon the strength of these unknown documents refunds have been ordered for sums mounting into millions, the Commission reporting its conclusion, but not the underlying proofs. The putative debtor does not know the proofs today. This is not the fair hearing essential to due process. It is condemnation without trial.

* * *

"From the standpoint of due process—the protection of the individual against arbitrary action—a deeper vice is this, that even now we do not know the particular or evidential

extraneous considerations which in other fields might have play in determining purely executive action.⁸⁶ Some statutes expressly require the agency's finding to be based upon the evidence.⁸⁷

Nothing can be treated as evidence which is not introduced as such.⁸⁸ Facts conceivably known to an agency, but not put in evidence so as to permit scrutiny and contest, will not support an order.⁸⁹ Thus an agency cannot base its conclusions on its files and other general information not put in evidence.⁹⁰ Papers in an agency's files are not always evidence in a case: it cannot take judicial notice of them. It must introduce, by specific reference, the parts of reports, etc., filed with it which it wishes to treat as evidence. Otherwise, while the data may be trustworthy, the parties before the Com-

facts of which the Commission took judicial notice and on which it rested its conclusion. Not only are the facts unknown; there is no way to find them out. When price lists or trade journals or even government reports are put in evidence upon a trial, the party against whom they are offered may see the evidence or hear it and parry its effect. Even if they are copied in the findings without preliminary proof, there is at least an opportunity in connection with a judicial review of the decision to challenge the deductions made from them. The opportunity is excluded here. The Commission, withholding from the record the evidential facts that it has gathered here and there, contents itself with saying that in gathering them it went to journals and tax lists, as if a judge were to tell us, 'I looked at the statistics in the Library of Congress, and they teach me thus and so.' This will never do if hearings and appeals are to be more than empty forms." (Mr. Justice Cardozo in *Ohio Bell Telephone Co. v. Public Utilities Commission* (1937) 301 U. S. 292, 300, 302, 303, 81 L. Ed. 1093, 57 S. Ct. 724.)

General References.

A valuable discussion as to the practical use by various administrative

agencies of material not offered as evidence is to be found in the Final Report of the Attorney General's Committee on Administrative Procedure (1941), pp. 398-403.

For a valuable practical discussion of the utilization by various administrative agencies of written evidence not subject to cross-examination, see the Final Report of the Attorney General's Committee on Administrative Procedure (1941), p. 404 et seq.

⁸⁶ *Morgan v. United States* (1936) 298 U. S. 468, 80 L. Ed. 1288, 56 S. Ct. 906; s. c. (1938) 304 U. S. 1, 82 L. Ed. 1129, 58 S. Ct. 773, rehearing denied 304 U. S. 23, 82 L. Ed. 1135, 58 S. Ct. 999.

⁸⁷ See *Vernon's Ann. Civ. St. Texas*, Art. 6008, §§ 11, 12.

⁸⁸ *United States v. Abilene & S. R. Co.* (1924) 265 U. S. 274, 68 L. Ed. 1016, 44 S. Ct. 565.

⁸⁹ *Crowell v. Benson* (1932) 285 U. S. 22, 76 L. Ed. 598, 52 S. Ct. 285; *The Chicago Junction Case* (1924) 264 U. S. 258, 68 L. Ed. 667, 44 S. Ct. 317.

⁹⁰ * *Ohio Bell Telephone Co. v. Public Utilities Commission* (1937) 301 U. S. 292, 81 L. Ed. 1093, 57 S. Ct. 724; *West Ohio Gas Co. v. Public Utilities Commission* (D. C. Ohio, 1928) 42 F. (2d) 899.

mission are left without notice of evidence with which they are, in fact, confronted, since it is used as a basis for a finding. A general notice by the agency that it intends to rely upon voluminous annual reports is tantamount to no notice whatever.⁹¹ This right to notice is not waived by the submission of the case to the agency without argument⁹² nor by acquiescence in the omission of a tentative report by an examiner.⁹³ Thus under the Longshoremen's and Harbor Workers' Compensation Act⁹⁴ an award not supported by evidence in the record is not in accordance with law.⁹⁵

Nor may an agency make its decision upon evidence which fails to include an important part of the testimony taken.⁹⁶ Thus it is unfair, an abuse of power, and cause for reversal, that an immigration inspector failed to put an important part of the testimony of three important witnesses in the record upon which the Commissioner of Immigration made his determination. And the vice is not cured by placing a copy of a letter to counsel regarding the testimony with the record when sent to the Secretary of Labor.⁹⁷

It has been held that immigration officials may refer to past records to determine the weight of testimony of a particular person.⁹⁸ Where an administrative proceeding involves the same questions as were involved in an earlier proceeding, the findings and order of the earlier proceeding may be considered as having been introduced in evidence in a later proceeding.⁹⁹

Affirmative and positive expert testimony which is uncontradicted cannot be disregarded¹ and it is arbitrary and capricious for a Commission, to reduce or reject entirely findings, valuations and allowances made by its own engineers, where there is no evidence justifica-

⁹¹ *United States v. Abilene & S. R. Co.* (1924) 265 U. S. 274, 68 L. Ed. 1016, 44 S. Ct. 565.

⁹² *United States v. Abilene & S. R. Co.* (1924) 265 U. S. 274, 68 L. Ed. 1016, 44 S. Ct. 565.

⁹³ *United States v. Abilene & S. R. Co.* (1924) 265 U. S. 274, 68 L. Ed. 1016, 44 S. Ct. 565.

⁹⁴ 33 USCA 901-950.

⁹⁵ *Crowell v. Benson* (1932) 285 U. S. 22, 76 L. Ed. 598, 52 S. Ct. 285.

⁹⁶ *Kwock Jan Fat v. White* (1920) 253 U. S. 454, 64 L. Ed. 1010, 40 S. Ct. 566; *Wong Kew ex rel. Wong Yook*

v. Ward (D. C. Mass., 1940) 33 F. Supp. 994.

⁹⁷ *Kwock Jan Fat v. White* (1920) 253 U. S. 454, 64 L. Ed. 1010, 40 S. Ct. 566.

⁹⁸ *Ex parte Wong Foo Gwong* (C. C. A. 9th, 1931) 50 F. (2d) 360.

⁹⁹ *Corray v. Baltimore & O. R. Co.* (D. C. E. D. Ill., 1933) 2 F. Supp. 829.

¹ *Nachod & United States Signal Co. v. Helvering* (C. C. A. 6th, 1934) 74 F. (2d) 164; *Pittsburgh Hotels Co. v. Commissioner of Internal Revenue* (C. C. A. 3d, 1930) 43 F. (2d) 345.

tion or explanation contrary to the engineers' in the record.² Although immigration officers are not bound by prior decisions as to the citizenship of an immigrant, where there has repeatedly been occasion to examine into the matter of such citizenship, which has universally been recognized, a discharge certificate issued by an immigration commissioner, showing such repeated investigation and acknowledgment, requires favorable action on application for admission in the absence of substantial contradictory evidence.³ Although the President is not required to accept the findings reported by the Tariff Commission, he must limit his consideration of the case to the evidence presented to that body, and must accept its recommendations if at all, upon the basis of that evidence.⁴

§ 315. — Evidence and Argument Must Be Considered.

Thus appropriate evidence introduced by a party to an administrative proceeding must be considered by the agency, and the agency's refusal to do so renders a resulting determination invalid.⁵ And consideration of the evidence should be in accordance with the rules of evidence.⁶ For instance, an administrative determination is invalid where uncontradicted testimony is erroneously disregarded.⁷ And when an agency ignores the evidence pertaining to the question presented to it, and decides a different question, its order is void.⁸ How-

² *Ohio Utilities Co. v. Public Utilities Commission* (1925) 267 U. S. 359, 69 L. Ed. 656, 45 S. Ct. 259.

³ *Application of Lee Hung Wong* (D. C. W. D. Wash., W. Div., 1928) 29 F. (2d) 768.

⁴ *Carl Zeiss, Inc. v. United States* (Ct. of Cust. & Pat. App., 1935) 76 F. (2d) 412.

⁵ *Alien Cases.*

Lloyd Sabando Societa Anonima v. Elting (1932) 287 U. S. 329, 77 L. Ed. 341, 53 S. Ct. 167.

Board of Tax Appeals.

Dempster Mill Mfg. Co. v. Burnet (1931) 60 App. D. C. 23, 46 F. (2d) 604; *Pittsburgh Hotels Co. v. Commissioner of Internal Revenue* (C. C. A. 3d, 1930) 43 F. (2d) 345; *International Banding Mach. Co. v. Commissioner of Internal Revenue* (C. C. A. 2d, 1930) 37 F. (2d) 660.

Interstate Commerce Commission.

Shields v. Utah Idaho C. R. Co. (1938) 305 U. S. 177, 83 L. Ed. 111, 59 S. Ct. 160; *United States v. Abilene & S. R. Co.* (1924) 265 U. S. 274, 68 L. Ed. 1016, 44 S. Ct. 565; *The Chicago Junction Case* (1924) 264 U. S. 258, 68 L. Ed. 667, 44 S. Ct. 317.

State Agencies.

Railroad Commission of California v. Pacific Gas & Electric Co. (1938) 302 U. S. 388, 82 L. Ed. 319, 58 S. Ct. 334.

⁶ *Dempster Mill Mfg. Co. v. Burnet* (1931) 60 App. D. C. 23, 46 F. (2d) 604.

⁷ *Dempster Mill Mfg. Co. v. Burnet* (1931) 60 App. D. C. 23, 46 F. (2d) 604.

⁸ *White v. Chin Fong* (1920) 253 U. S. 90, 64 L. Ed. 797, 40 S. Ct. 449.

ever, where there is conflict no particular evidence is controlling and this requirement of a full hearing is satisfied if due consideration is given to all evidence relating to each particular issue.⁹ If nothing appears to the contrary a reviewing court assumes that an agency has considered the evidence.¹⁰ And if on appeal the record is not presented, the court will not presume that the agency ignored any particular factor introduced in evidence, such as, in rate making proceedings, evidence of the probable rate of return.¹¹ Nor will the fact that the agency's report does not refer specifically to certain evidence be taken to show that such evidence was ignored by the agency.¹² However, agencies should make complete reports, whose principal purpose, in view of the substantial evidence rule, is to inform the parties and a reviewing court as to what the agency has considered.¹³

Findings may also be tested under the substantial evidence rule which goes to the basic prerequisites of proof.^{13a}

An administrative agency must also consider a party's arguments based on evidence and law to the same extent that it must consider the evidence itself. Where an examiner conducts the hearing, and later the proceeding is transferred to the agency, without an intermediate report, it must be assumed, in the absence of evidence to the contrary, that the examiner transmitted a party's brief to the agency, and that the agency considered the brief and the evidence submitted to the examiner in making its finding.¹⁴

§ 316. Evidence Relied on Must Be Recorded.

Due process requires that the evidence on which an agency bases a finding, be ascertainable. Hence failure by the agency to provide, for scrutiny upon judicial review, a record of the evidence adduced, is a denial of due process.¹⁵ A reviewing court must not be left without

⁹ *Beaumont, S. L. & W. R. Co. v. United States* (1930) 282 U. S. 74, 75 L. Ed. 221, 51 S. Ct. 1; *Youngstown Sheet & Tube Co. v. United States* (D. C. Ohio, 1934) 7 F. Supp. 33, *aff'd* 295 U. S. 476, 79 L. Ed. 1553, 55 S. Ct. 822.

¹⁰ *Consolidated Edison Co. v. National Labor Relations Board* (1938) 305 U. S. 197, 83 L. Ed. 126, 59 S. Ct. 206.

¹¹ See §§ 577, 756.

¹² *Flynn ex rel. Wong Chee Ming v. Tillinghast* (C. C. A. 1st, 1931) 47 F. (2d) 21.

¹³ *Beaumont, S. L. & W. R. Co. v. United States* (1930) 282 U. S. 74, 75 L. Ed. 221, 51 S. Ct. 1.

^{13a} See § 575 et seq.

¹⁴ *Consolidated Edison Co. v. National Labor Relations Board* (1938) 305 U. S. 197, 83 L. Ed. 126, 59 S. Ct. 206.

¹⁵ *Alien Cases*.

Kwock Jan Fat v. White (1920) 253 U. S. 454, 64 L. Ed. 1010, 40 S. Ct. 566. See *Kishan Singh v. Carr* (C. C. A. 9th, 1937) 88 F. (2d) 672.

the necessary data on which to form a view of the correctness, in the light of the statute, of the agency's action,¹⁶ and the reports and order of a Commission constitute the only authoritative evidence of its action.¹⁷ Facts conceivably known to an agency, but not put in a

Federal Radio Commission.

See *Saltzman v. Stromberg-Carlson Telephone Mfg. Co.* (1931) 60 App. D. C. 31, 46 F. (2d) 612.

National Labor Relations Board.

Inland Steel Co. v. National Labor Relations Board (C. C. A. 7th, 1940) 109 F. (2d) 9. See *Montgomery Ward & Co. v. National Labor Relations Board* (C. C. A. 8th, 1939) 103 F. (2d) 147.

National Mediation Board.

Brotherhood of Railroad Trainmen v. National Mediation Board (1936) 66 App. D. C. 375, 88 F. (2d) 757.

State Agencies.

West Ohio Gas Co. v. Public Utilities Commission of Ohio (1935) 294 U. S. 63, 79 L. Ed. 761, 55 S. Ct. 316.

Workmen's Compensation Cases.

See *Crowell v. Benson* (1932) 285 U. S. 22, 76 L. Ed. 598, 52 S. Ct. 285.

Quotations.

"The acts of Congress give great power to the Secretary of Labor over Chinese immigrants and persons of Chinese descent. It is a power to be administered, not arbitrarily and secretly, but fairly and openly, under the restraints of the tradition and principles of free government applicable where the fundamental rights of men are involved, regardless of their origin or race. It is the province of the courts, in proceedings for review, within the limits amply defined in the cases cited, to prevent abuse of this extraordinary power, and this is possible only when a full record is preserved of the essentials on which the executive officers proceed to judgment. For failure to preserve such a record for the information, not less of

the Commissioner of Immigration and of the Secretary of Labor than of the courts, the judgment in this case must be reversed." (Mr. Justice Clark in *Kwock Jan Fat v. White* (1920) 253 U. S. 454, 464, 64 L. Ed. 1010, 40 S. Ct. 566.)

"Under the statutes of Ohio no provision is made for a review of the order of the Commission by a separate or independent suit. The sole method of review is by petition in error to the Ohio Supreme Court, which considers both the law and the facts. *Dayton P. & L. Co. v. P. U. Commission of Ohio*, 292 U. S. 290, 302; *Hocking Valley Ry. Co. v. Public Utilities Commission*, 100 Ohio St. 321, 326, 327; 126 N. E. 397. To make such review adequate the record must exhibit in some way the facts relied upon by the court to repel unimpeached evidence submitted for the company. If that were not so, a complainant would be helpless, for the inference would always be possible that the court and the Commission had drawn upon undisclosed sources of information unavailable to others. A hearing is not judicial, at least in any adequate sense, unless the evidence can be known." (Mr. Justice Cardozo in *West Ohio Gas Co. v. Public Utilities Commission* (1935) 294 U. S. 63, 68, 69, 79 L. Ed. 761, 55 S. Ct. 316.)

¹⁶ *Brotherhood of Railroad Trainmen v. National Mediation Board* (1936) 66 App. D. C. 375, 88 F. (2d) 757.

¹⁷ *Illinois Cent. R. Co. v. Public Utilities Commission* (1918) 245 U. S. 493, 62 L. Ed. 425, 38 S. Ct. 170.

record of the evidence so as to permit scrutiny and contest, will not support an order.¹⁸ Thus a hearing is unfair and an abuse of power where an immigration inspector fails to record in the proper place an important part of the testimony of three important witnesses, as to identification of a person as a citizen, so that this evidence is not before the commissioner when he decides, and the only form in which the facts are before the Secretary of Labor on appeal is in a copy of a letter to counsel, placed with the record after the decision below.¹⁹ A trial examiner must either permit the official reporter to take down all that occurs at the hearing or permit parties to provide a reporter to take material which he has forbidden the official reporter to record.²⁰ And a party has a right to have a full record of an administrative hearing made by a private reporter.²¹ But the omission of a few sentences from the transcript of a hearing before an immigration inspector, regarding a matter which could not possibly prejudice the substantial rights of the alien, does not render the hearing unfair.²²

Where a statute contemplates a hearing this implies that all proceedings of the agency in a particular case shall be appropriately set forth, and that whatever facts it may ascertain, and their sources, shall be shown in the record and be open to challenge and opposing evidence.²³

§ 317. Conduct of Hearing by Employee Does Not Exempt Agency from Deciding on Evidence.

A statute permitting an employee to conduct the hearing does not exempt the agency itself from the constitutional necessity of considering the evidence.²⁴ This rule is specially confirmed where statutory provisions require an agency to certify to a reviewing court a tran-

¹⁸ *Crowell v. Benson* (1932) 285 U. S. 22, 76 L. Ed. 598, 52 S. Ct. 285. See also § 314.

¹⁹ *Kwock Jan Fat v. White* (1920) 253 U. S. 454, 64 L. Ed. 1010, 40 S. Ct. 566.

²⁰ *Inland Steel Co. v. National Labor Relations Board* (C. C. A. 7th, 1940) 109 F. (2d) 9; *Montgomery Ward & Co. v. National Labor Relations Board* (C. C. A. 8th, 1939) 103 F. (2d) 147.

²¹ *Inland Steel Co. v. National Labor Relations Board* (C. C. A. 7th, 1940) 109 F. (2d) 9.

²² *Kishan Singh v. Carr* (C. C. A. 9th, 1937) 88 F. (2d) 672.

²³ *Kwock Jan Fat v. White* (1920) 253 U. S. 454, 64 L. Ed. 1010, 40 S. Ct. 566. See *Inland Steel Co. v. National Labor Relations Board* (C. C. A. 7th, 1940) 109 F. (2d) 9; *Montgomery Ward & Co. v. National Labor Relations Board* (C. C. A. 8th, 1939) 103 F. (2d) 147.

²⁴ **Anniston Mfg. Co. v. Davis* (1937) 301 U. S. 337, 81 L. Ed. 1143, 57 S. Ct. 816.

script of the record upon which its determinations are based.²⁵ *A fortiori* the agency is not bound by the recommendations of its examiner. It is not only at liberty, but required, to reach its own conclusions upon the evidence.²⁶

8. Right to Rehearing

§ 318. In General.

An agency's right to grant a rehearing, reopening, or reargument of an administrative proceeding, due to the legislative function served by administrative determinations, is virtually unlimited in the absence of statute.²⁷ And an agency's denial of a petition for rehearing, reopening and reargument is a denial of a fair hearing only if arbitrary.²⁸ Arbitrariness may be established only in clear cases.²⁹

²⁵ *Anniston Mfg. Co. v. Davis* (1937) 301 U. S. 337, 81 L. Ed. 1143, 57 S. Ct. 816.

²⁶ *Federal Radio Commission v. Nelson Bros. Bond & Mtg. Co.* (1933) 289 U. S. 266, 77 L. Ed. 1166, 53 S. Ct. 627, 89 A. L. R. 406.

²⁷ See § 183 et seq.

²⁸ *Alien Cases.*

Flynn ex rel. Jew Yet Wing v. Tillinghast (C. C. A. 1st, 1930) 44 F. (2d) 789.

Interstate Commerce Commission.

Mississippi Valley Barge Line Co. v. United States (1934) 292 U. S. 282, 78 L. Ed. 1260, 54 S. Ct. 692; *United States v. Northern Pac. R. Co.* (1933) 288 U. S. 490, 77 L. Ed. 914, 53 S. Ct. 406; ** Atchison, T. & S. F. R. Co. v. United States* (1932) 284 U. S. 248, 76 L. Ed. 273, 52 S. Ct. 146; *United States ex rel. Maine Potato Growers & Shippers Ass'n v. Interstate Commerce Commission* (1937) 66 App. D. C. 398, 88 F. (2d) 780, cert. den. 300 U. S. 684, 81 L. Ed. 886, 57 S. Ct. 754. *Secretary of Agriculture.*

Acker v. United States (1936) 298 U. S. 426, 80 L. Ed. 1257, 56 S. Ct. 824, rehearing denied 298 U. S. 692, 80 L. Ed. 1409, 56 S. Ct. 951; *Union Stock Yards Co. of Omaha v. United States* (D. C. D. Neb., Omaha Div., 1934)

9 F. Supp. 864. See *American Commission Co. v. United States* (D. C. Colo., 1935) 11 F. Supp. 965.

Quotations.

"The legal standards governing the action of the Commission in determining the reasonableness of rates are unaltered. In the discharge of its duty, a fair hearing is a fundamental requirement. *Interstate Commerce Comm. v. Louisville & Nashville R. Co.*, 227 U. S. 88, 91. In the instant proceeding, the hearing accorded related to conditions which had been radically changed, and a hearing, suitably requested, which would have permitted the presentation of evidence relating to existing conditions, was denied. We think that this action was not within the permitted range of the Commission's discretion, but was a denial of right. The order of the Commission which was thus made effective, and the ensuing supplemental order, cannot be sustained." (Mr. Chief Justice Hughes in *Atchison, T. & S. F. R. Co. v. United States* (1932) 284 U. S. 248, 262, 76 L. Ed. 273, 52 S. Ct. 146.)

²⁹ *Mississippi Valley Barge Line Co. v. United States* (1934) 292 U. S. 282, 78 L. Ed. 1260, 54 S. Ct. 692.

Denial of a rehearing petition is arbitrary where the petition shows that economic conditions have so altered since the close of the prior hearing that the administrative record is irresponsive to present conditions, and so cannot be a proper basis for administrative application of the mandate of the statute at the later time.³⁰ When economic conditions have altered substantially, considerations which would ordinarily justify denial of a petition for rehearing, such as the fact that the first hearing was regularly conducted, lengthy, open to all interested parties and participated in by them, and the fact that the administrative action necessarily set up a complicated system of rates and that reopening would mean further lengthy proceedings, have no force.³¹ Ordinarily a reasonable period of time must have elapsed before a petition for rehearing based upon changed economic conditions will be considered persuasive, although the most important considerations are the economic conditions themselves. Thus it has been held that two and one-half years covered a vital change in economic conditions,³² while it has been said to be inconceivable that economic conditions could have altered sufficiently in a period of three months³³ or two months.³⁴ Denial of a petition for rehearing, asked because of changed economic conditions created by an unprecedented drought was proper, where the effect of the drought was a subject of speculation, when the rehearing was requested.³⁵

Denial of a petition for rehearing may not be arbitrary where granting the petition would place the agency in the position of being unable to protect the interests of the public.³⁶ The rule that a change in economic conditions may make arbitrary a denial of a petition for rehearing does not apply where the change cannot have had a substantial effect,³⁷ or where the matter involved is not substantial, as

³⁰ *Atchison, T. & S. F. R. Co. v. United States* (1932) 284 U. S. 248, 76 L. Ed. 273, 52 S. Ct. 146.

³¹ *Atchison, T. & S. F. R. Co. v. United States* (1932) 284 U. S. 248, 76 L. Ed. 273, 52 S. Ct. 146.

³² *Atchison, T. & S. F. R. Co. v. United States* (1932) 284 U. S. 248, 76 L. Ed. 273, 52 S. Ct. 146.

³³ *Acker v. United States* (1936) 298 U. S. 426, 80 L. Ed. 1257, 59 S. Ct. 824, rehearing denied 298 U. S. 692, 80 L. Ed. 1409, 56 S. Ct. 951.

³⁴ *United States ex rel. Maine Potato Growers & Shippers Ass'n v. Interstate Commerce Commission*

(1937) 66 App. D. C. 398, 88 F. (2d) 780, cert. den. 300 U. S. 684, 81 L. Ed. 886, 57 S. Ct. 754.

³⁵ *American Commission Co. v. United States* (D. C. Colo., 1935) 11 F. Supp. 965.

³⁶ *United States v. Northern Pac. R. Co.* (1933) 288 U. S. 490, 77 L. Ed. 914, 53 S. Ct. 406; *Mississippi Valley Barge Line Co. v. United States* (D. C. Mo., 1933) 4 F. Supp. 745, aff'd 292 U. S. 282, 78 L. Ed. 1260, 54 S. Ct. 692.

³⁷ *Union Stock Yards Co. of Omaha v. United States* (D. C. Neb., Omaha Div., 1934) 9 F. Supp. 864 (Secy. of Agriculture).

where the effect on carrier revenue of a prescribed change in rates is insignificant.³⁸

A petition to reopen a proceeding must show a specific purpose for so doing. A petition couched in broad or general terms may be denied without abuse of discretion even though a reasonable specific purpose existed.³⁹

§ 319. Diligence Necessary.

There is no arbitrary abuse of discretion in denying a petition for rehearing where grounds urged which might otherwise be adequate are not presented with due diligence, as for instance where the evidence as to economic conditions which is urged could have been presented at the prior hearing.⁴⁰ Thus, the refusal of the Secretary of Labor on appeal from an order excluding a Chinese claiming admission as the son of a native-born citizen, to reopen the case for the introduction of further evidence was held to be not a denial of a fair hearing where the applicant was accorded full opportunity to present all witnesses and documentary evidence at the original hearing and no allegation was made that witnesses were unavailable at the time of the original hearing or that their testimony was then unknown.⁴¹ A refusal to reopen for the purpose of taking medical testimony as to the age of an alien is not arbitrary where the case has previously been reopened to permit the applicant's examination by private physicians and the opportunity has been declined.⁴²

II. PROCEDURAL DUE PROCESS IN JUDICIAL REVIEW

§ 320. General Requirements Applicable to All Judicial Proceedings.

There is no difference in substance between the principles of procedural due process which are applicable to administrative proceedings, and those which are applicable to judicial proceedings. Both

³⁸ *United States v. Northern Pac. R. Co.* (1933) 288 U. S. 490, 77 L. Ed. 914, 53 S. Ct. 406.

³⁹ *United States v. Northern Pac. R. Co.* (1933) 288 U. S. 490, 77 L. Ed. 914, 53 S. Ct. 406.

⁴⁰ *Acker v. United States* (1936) 298 U. S. 426, 80 L. Ed. 1257, 59 S. Ct. 824, rehearing denied 298 U. S. 692, 80 L. Ed. 1409, 56 S. Ct. 951;

United States v. Northern Pac. R. Co.

(1933) 288 U. S. 490, 77 L. Ed. 914, 53 S. Ct. 406.

⁴¹ *Wong Shong Been v. Proctor* (C. C. A. 9th, 1935) 79 F. (2d) 881, cert. den. 298 U. S. 665, 80 L. Ed. 1389, 56 S. Ct. 746; *United States ex rel. Chin Cheung Nai v. Corsi* (D. C. S. D. N. Y., 1932) 55 F. (2d) 360.

⁴² *Flynn ex rel. Jew Yet Wing v. Tillinghast* (C. C. A. 1st, 1930) 44 F. (2d) 789.

rest upon the same constitutional provisions, and the principles, relating to substance as they do, are equally applicable to either type of proceeding. The Fourteenth Amendment governs any action of a state, whether through its legislature, through its courts, or through its executive or administrative officers.⁴³ Presumably the Fifth Amendment has like application to action of the Federal Government.

Judicial proceedings are older in development, and a judicial tradition of fair play to meet the requirements of procedural due process has become so firmly established as to be regarded as rudimentary. Administrative proceedings of an adversary nature, being quasi-judicial in character, must conform to that tradition.

§ 321. Agency's Findings May Be Prima Facie Evidence in Judicial Proceedings.

The Valuation Act⁴⁴ directs the Interstate Commerce Commission to make findings of the value of railroad property. The Commission's "final valuations" and "the classification thereof" are made *prima facie* evidence in controversies under the Act to Regulate Commerce.⁴⁵ This is not a denial of due process.⁴⁶ The provision only establishes a rebuttable presumption. It cuts off no defense, interposes no obstacle to a full contestation of all the issues, and takes no question of fact from either court or jury. At most therefore it is merely a rule of evidence.⁴⁷

§ 322. State Cases: Only Federal Question is Procedural Due Process.

The principal question as to state procedure raised in the federal courts is whether the procedural due process guaranteed by the Fourteenth Amendment to the Constitution of the United States has been satisfied. So long as state procedure on judicial review satisfies the substantive requirements of procedural due process the form is immaterial.⁴⁸

⁴³ *Mooney v. Holohan* (1935) 294 U. S. 103, 79 L. Ed. 791, 55 S. Ct. 340, 98 A. L. R. 406, rehearing denied 294 U. S. 732, 79 L. Ed. 1261, 55 S. Ct. 511.

⁴⁴ 49 USCA 19a.

⁴⁵ 49 USCA 1 et seq.

⁴⁶ *United States v. Los Angeles & S. L. R. Co.* (1927) 273 U. S. 299, 71 L. Ed. 651, 47 S. Ct. 413.

⁴⁷ *United States v. Los Angeles & S. L. R. Co.* (1927) 273 U. S. 299, 71 L. Ed. 651, 47 S. Ct. 413.

⁴⁸ *United Gas Public Service Co. v. Texas* (1938) 303 U. S. 123, 82 L. Ed. 702, 58 S. Ct. 483, rehearing denied 303 U. S. 667, 82 L. Ed. 1124, 58 S. Ct. —.

Where no federal rights are asserted, no question of procedure on state judicial review may be considered by the federal courts. No question as to the validity of state procedure under state laws and state constitution can be raised in a case coming to the United States Supreme Court from state courts. The final judgment of the state court must be taken as determining that the procedure actually adopted satisfied all state requirements. Questions of correct state practice are not reviewable in the Supreme Court unless federal rights are asserted.⁴⁹

⁴⁹ United Gas Public Service Co. v. 303 U. S. 667, 82 L. Ed. 1124, 58 S. Texas (1938) 303 U. S. 123, 82 L. Ed. Ct. —.
702, 58 S. Ct. 483, rehearing denied

CHAPTER 22

DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS OF LAW: CONFISCATION

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I. NATURE OF CONFISCATION: DEFINITIONS: CONDITIONS
UNDER WHICH IT MAY EXIST

§ 323. Definitions: When Confiscation Exists.

By confiscation is meant that private property is taken for public use without just compensation, this being a violation of the due process clause.¹ Though the use of property may be demanded, it must be paid for.² Confiscation may result from a taking of the use of property without compensation quite as well as from a taking of the title,³ and it may result from an order temporary in effect, as well as from a permanent one.⁴ The established principle is that as the due process clauses (Amendments V and XIV) safeguard against

¹ Interstate Commerce Commission.
Baltimore & O. R. Co. v. United States (1936) 298 U. S. 349, 80 L. Ed. 1209, 56 S. Ct. 797.
State Agencies.

West v. Chesapeake & Potomac Telephone Co. (1935) 295 U. S. 662, 79 L. Ed. 1640, 55 S. Ct. 894; United Railways & Electric Co. v. West (1930) 280 U. S. 234, 74 L. Ed. 390, 50 S. Ct. 123; Smyth v. Ames (1898) 169 U. S. 466, 42 L. Ed. 819, 18 S. Ct. 418.

² San Joaquin & K. R. Canal & Irrigation Co. v. County of Stanislaus

(1914) 233 U. S. 454, 58 L. Ed. 1041, 34 S. Ct. 652.

³ Chicago, R. I. & P. R. Co. v. United States (1931) 284 U. S. 80, 76 L. Ed. 177, 52 S. Ct. 87; United Railways & Electric Co. v. West (1930) 280 U. S. 234, 74 L. Ed. 390, 50 S. Ct. 123; The Minnesota Rate Cases (1913) 230 U. S. 352, 57 L. Ed. 1511, 33 S. Ct. 729; The Missouri Rate Cases (1913) 230 U. S. 474, 57 L. Ed. 1571, 33 S. Ct. 975.

⁴ Beaver Valley Water Co. v. Driscoll (D. C. W. D. Pa., 1938) 23 F. Supp. 795.

such taking, neither nation nor state may require the use of privately owned property without just compensation. When the property itself is taken by eminent domain, just compensation is its value at the time of taking. So, where by legislation prescribing rates or charges the use of the property is taken, just compensation is a reasonable rate of return upon the value of the property at the time that it is being used for the public service.⁵ Where a utility is compelled to charge unreasonably low rates, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law and in violation of the Constitution of the United States.⁶

The criteria for deciding the issue of confiscation are the same whether rates are prescribed by statute or by an administrative agency.⁷ And confiscation exists when a public service is required at non-compensatory rates even though the utility has no right to continue the service.⁸ Thus, where a street car company's franchise had expired, so that the company could have been forced to discontinue, a city ordinance requiring continuance of service is unconstitutional which requires such service at a non-compensatory rate.⁹

Confiscation may be effected by unreasonable delay in terminating confiscatory rates as well as by specific prescription.¹⁰ It may be

⁵ *West v. Chesapeake & Potomac Telephone Co.* (1935) 295 U. S. 662, 79 L. Ed. 1640, 55 S. Ct. 894; *Los Angeles Gas & Electric Corp. v. Railroad Commission* (1933) 289 U. S. 287, 77 L. Ed. 1180, 53 S. Ct. 637; *Board of Public Utility Com'rs v. New York Telephone Co.* (1926) 271 U. S. 23, 70 L. Ed. 808, 46 S. Ct. 363; *San Diego Land & Town Co. v. National City* (1899) 174 U. S. 739, 43 L. Ed. 1154, 19 S. Ct. 804.

⁶ *Interstate Commerce Commission*.

Baltimore & O. R. Co. v. United States (1936) 298 U. S. 349, 80 L. Ed. 1209, 56 S. Ct. 797.

State Agencies.

United Railways & Electric Co. v. West (1930) 280 U. S. 234, 74 L. Ed. 390, 50 S. Ct. 123; *Ottinger v. Consolidated Gas Co.* (1926) 272 U. S. 576, 71 L. Ed. 420, 47 S. Ct. 198; *Bluefield Waterworks & Improvement*

Co. v. Public Service Commission (1923) 262 U. S. 679, 67 L. Ed. 1176, 43 S. Ct. 675; *Southern Iowa Electric Co. v. City of Chariton* (1921) 255 U. S. 539, 65 L. Ed. 764, 41 S. Ct. 400; *Willeox v. Consolidated Gas Co.* (1909) 212 U. S. 19, 53 L. Ed. 382, 29 S. Ct. 192.

⁷ *Newton v. Consolidated Gas Co.* (1922) 258 U. S. 165, 66 L. Ed. 538, 42 S. Ct. 264; *Willeox v. Consolidated Gas Co.* (1909) 212 U. S. 19, 53 L. Ed. 382, 29 S. Ct. 192.

⁸ *Detroit United R. Co. v. Detroit* (1919) 248 U. S. 429, 63 L. Ed. 341, 39 S. Ct. 151.

⁹ *Detroit United R. Co. v. Detroit* (1919) 248 U. S. 429, 63 L. Ed. 341, 39 S. Ct. 151.

¹⁰ *Smith v. Illinois Bell Telephone Co.* (1926) 270 U. S. 587, 70 L. Ed. 747, 46 S. Ct. 408.

effected by establishing unreasonably low rates or by making regulations incidental to the rates which tend to make them confiscatory.¹¹ The fact that rates assailed as confiscatory have been in effect for some time does not of itself establish that the rates are not confiscatory.¹² Whether a given rate is confiscatory may depend on the type of utility which claims confiscation.¹³

§ 324. — Just Compensation.

When the rates which a utility may charge are regulated, the use of its property is taken for compensation, and the level of the rates is the measure of compensation. A utility is entitled to rates, not *per se* excessive and extortionate, which are sufficient to yield a reasonable rate of return after payment of operating expenses, taxes, and financial charges, for the use of the property at the time it is being used to render the service.¹⁴ It is not entitled, as a matter of constitutional right, to more than a fair net income upon the properties which are being devoted to a public use.¹⁵ If the schedule of rates provides a reasonable return upon the fair value of the utility's property, then the order must stand, even though the value as fixed by the agency in its order, is too low.¹⁶ By investment in a business dedicated to the public service, the owner must recognize that, as compared with private business, he cannot expect high or speculative dividends, but that his obligation limits him to only fair or reasonable profit.¹⁷ But when property is devoted to a public use, the title of the private owner remains, and the use, though it may

¹¹ Great Falls Gas Co. v. Public Service Commission (D. C. D. Mont., 1930) 39 F. (2d) 176.

¹² Allen v. St. Louis, I. M. & S. R. Co. (1913) 230 U. S. 553, 57 L. Ed. 1625, 33 S. Ct. 1030.

¹³ Smith v. Illinois Bell Telephone Co. (1930) 282 U. S. 133, 75 L. Ed. 255, 51 S. Ct. 65; United Railways & Electric Co. v. West (1930) 280 U. S. 234, 74 L. Ed. 390, 50 S. Ct. 123.

¹⁴ Interstate Commerce Commission.

Baltimore & O. R. Co. v. United States (1936) 298 U. S. 349, 80 L. Ed. 1209, 56 S. Ct. 797.

Secretary of Agriculture.

Denver Union Stock Yard Co. v. United States (1938) 304 U. S. 470, 82 L. Ed. 1469, 58 S. Ct. 990.

State Agencies.

Smyth v. Ames (1898) 169 U. S. 466, 42 L. Ed. 819, 18 S. Ct. 418; Greencastle Water Works Co. v. Public Service Commission (D. C. S. D. Ind., 1929) 31 F. (2d) 600.

¹⁵ Dayton-Goose Creek R. Co. v. United States (1924) 263 U. S. 456, 68 L. Ed. 388, 44 S. Ct. 169, 33 A. L. R. 472.

¹⁶ Greencastle Water Works Co. v. Public Service Commission (D. C. S. D. Ind., 1929) 31 F. (2d) 600.

¹⁷ Dayton-Goose Creek R. Co. v. United States (1924) 263 U. S. 456, 68 L. Ed. 388, 44 S. Ct. 169, 33 A. L. R. 472.

be demanded, must be paid for.¹⁸ When the rate of return is reasonably sufficient to assure confidence in the financial soundness of the utility and is adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties, there is no confiscation.¹⁹

§ 325. — Rights and Relation of Utility and Customers.

The customers are entitled to demand service and the company must comply. The company is entitled to just compensation and, to have the service, the customers must pay for it. The relation between the company and its customers is not that of partners, agent and principal, or trustee and beneficiary.²⁰ The revenue paid by the customers for service belongs to the company. The amount, if any, remaining after paying taxes and operating expenses, including the expense of depreciation is the company's compensation for the use of its property.²¹ If there is no return, or if the amount is less than a reasonable return, the company must bear the loss. Past losses cannot be used to enhance the value of the property or to support a claim that rates for the future are confiscatory.²² And the law does not require the company to give up for the benefit of future subscribers any part of its accumulations from past operations. Profits of the past cannot be used to sustain confiscatory rates for the future.²³ Customers pay for service, not for the property used to render it. Their payments are not contributions to depreciation or other operating expenses, or to capital of the company. By paying bills for service they do not acquire any interest, legal or equitable, in the property used for their convenience or in the funds of the company. Property paid for out of moneys received for service

¹⁸ *San Joaquin & K. R. Canal & Irrigation Co. v. County of Stanislaus* (1914) 233 U. S. 454, 58 L. Ed. 1041, 34 S. Ct. 652.

¹⁹ *Smith v. Illinois Bell Telephone Co.* (1930) 282 U. S. 133, 75 L. Ed. 255, 51 S. Ct. 65.

²⁰ *Board of Public Utility Com'rs v. New York Telephone Co.* (1926) 271 U. S. 23, 70 L. Ed. 808, 46 S. Ct. 363.

²¹ *Board of Public Utility Com'rs v. New York Telephone Co.* (1926)

271 U. S. 23, 70 L. Ed. 808, 46 S. Ct. 363.

²² *Board of Public Utility Com'rs v. New York Telephone Co.* (1926) 271 U. S. 23, 70 L. Ed. 808, 46 S. Ct. 363.

²³ *Board of Public Utility Com'rs v. New York Telephone Co.* (1926) 271 U. S. 23, 70 L. Ed. 808, 46 S. Ct. 363.

belongs to the company just as does that purchased out of proceeds of its bonds and stock.²⁴

§ 326. No Confiscation Where No Investment.

The only thing which may be confiscated by a rate order or anything else is the investment in a business, that is, property.²⁵ A consumer's statutory right to be served by a public utility is not such a property right as may form the basis of a claim for confiscation.²⁶ No question of confiscation can be involved where rates are fixed for a personal service rendered, such as stockyards services where little capital is employed,²⁷ and, there being no constitutional question, there is no right to a trial *de novo*.²⁸ Hence confiscation cannot be shown where there is no proof of the value of the property in question or the return upon it.²⁹ Thus, the order of a state commission will not be enjoined where there is no proof of the value of the carrier's property within the state, of the return it received from its entire intrastate business, of the portion of the road affected by the order, or of the return from all of its intrastate business upon that part of its lines.³⁰

§ 327. Where Rates Instituted Pursuant to Contract.

Confiscation may not be asserted where rates have been instituted pursuant to contract.³¹ Where a city has the capacity to contract,

²⁴ Board of Public Utility Com'rs v. New York Telephone Co. (1926) 271 U. S. 23, 70 L. Ed. 808, 46 S. Ct. 363.

²⁵ St. Joseph Stock Yards Co. v. United States (1936) 298 U. S. 38, 80 L. Ed. 1033, 59 S. Ct. 720; United States Light & Heat Corp. v. Niagara Falls Gas & Electric Light Co. (C. C. A. 2d, 1931) 47 F. (2d) 567, cert. den. 283 U. S. 864, 75 L. Ed. 1469, 51 S. Ct. 656.

²⁶ United States Light & Heat Corp. v. Niagara Falls Gas & Electric Light Co. (C. C. A. 2d, 1931) 47 F. (2d) 567, cert. den. 283 U. S. 864, 75 L. Ed. 1469, 51 S. Ct. 656.

²⁷ Acker v. United States (1936) 298 U. S. 426, 80 L. Ed. 1257, 56 S. Ct. 824, rehearing denied 298 U. S. 692, 80 L. Ed. 1409, 56 S. Ct. 951. See

American Commission Co. v. United States (D. C. Colo., 1935) 11 F. Supp. 965.

²⁸ Acker v. United States (1936) 298 U. S. 426, 80 L. Ed. 1257, 56 S. Ct. 824, rehearing denied 298 U. S. 692, 80 L. Ed. 1409, 56 S. Ct. 951. See also § 262 et seq.

²⁹ Wood v. Vandalia R. Co. (1913) 231 U. S. 1, 58 L. Ed. 97, 34 S. Ct. 7.

³⁰ Wood v. Vandalia R. Co. (1913) 231 U. S. 1, 58 L. Ed. 97, 34 S. Ct. 7.

³¹ Georgia Power Co. v. Decatur (1930) 281 U. S. 505, 74 L. Ed. 999, 50 S. Ct. 369; Denney v. Pacific Telephone & Telegraph Co. (1928) 276 U. S. 97, 72 L. Ed. 483, 48 S. Ct. 223; *Henderson Water Co. v. Corporation Commission (1925) 269 U. S. 278, 70

and makes a valid contract, both parties are bound; the city cannot constitutionally alter the rates fixed, and the utility must, in the absence of impossibility of performance, carry out its obligations, even at a loss. Such contracts are not permissive franchises, which may be abandoned because rates are unremunerative.³² Losses are immaterial where the company is bound by contract.³³ The company, when bound by the terms of the contract, is not entitled to any judicial relief, no matter how inadequate the rates.³⁴

However, the right to regulate the charges for a public service is a governmental function, and a municipality has not the power to contract to deprive a state of that power, unless expressly authorized to do so. All doubts will be resolved against the alleged surrender of power.³⁵ Consequently, where a state statute forbids a city to abridge, by contract, its right to fix rates, so that there is no power to contract in the city, the city cannot enforce confiscatory rates embodied in an ordinance upon the theory that they are contract rates.³⁶ And where the State Constitution forbids an irrevocable grant of special privilege the right to contract cannot exist in the city, since it conflicts with the dominant power to regulate. Nor can a rate ordinance be a unilateral contract binding the utility only. If the city is not bound by contract, it is bound to exercise its power to regulate, and hence the supposed unilateral condition would be nugatory.³⁷

L. Ed. 273, 46 S. Ct. 112; *Georgia Railway & Power Co. v. Decatur* (1923) 262 U. S. 432, 67 L. Ed. 1065, 43 S. Ct. 613; *Oklahoma Natural Gas Co. v. Oklahoma* (1922) 258 U. S. 234, 66 L. Ed. 590, 42 S. Ct. 287; *San Antonio v. San Antonio Public Service Co.* (1921) 255 U. S. 547, 65 L. Ed. 777, 41 S. Ct. 428; *Southern Iowa Electric Co. v. City of Chariton* (1921) 255 U. S. 539, 65 L. Ed. 764, 41 S. Ct. 400; *Columbus Railway, Power, & Light Co. v. Columbus* (1919) 249 U. S. 399, 63 L. Ed. 669, 39 S. Ct. 349, 6 A. L. R. 1648. See *Central Kentucky Natural Gas Co. v. Railroad Commission* (1933) 290 U. S. 264, 78 L. Ed. 307, 54 S. Ct. 154.

³² *Columbus Railway, Power, & Light Co. v. Columbus* (1919) 249 U.

S. 399, 63 L. Ed. 669, 39 S. Ct. 349, 6 A. L. R. 1648.

³³ *Georgia Power Co. v. Decatur* (1930) 281 U. S. 505, 74 L. Ed. 999, 50 S. Ct. 369.

³⁴ *Henderson Water Co. v. Corporation Commission* (1925) 269 U. S. 278, 70 L. Ed. 273, 46 S. Ct. 112.

³⁵ *Columbus Railway, Power, & Light Co. v. Columbus* (D. C. S. D. Ohio, 1918) 253 Fed. 499, *aff'd* 249 U. S. 399, 63 L. Ed. 669, 39 S. Ct. 349, 6 A. L. R. 1648.

³⁶ *Southern Iowa Electric Co. v. Chariton* (1921) 255 U. S. 539, 65 L. Ed. 764, 41 S. Ct. 400.

³⁷ *San Antonio v. San Antonio Public Service Co.* (1921) 255 U. S. 547, 65 L. Ed. 777, 41 S. Ct. 428.

When a federal court's investigation of state law shows that a state administrative agency has power to terminate a utility franchise or contract or alter the rates established by it, and the facts show that the agency has done either, rates prescribed by the agency superseding the franchise or contract rate are not contractual rates and may be assailed as confiscatory.³⁸ In such cases however, it is only by securing a waiver of the franchise rates by the commission speaking for the state that the company has any standing to ask for rates in excess of franchise rates.³⁹ Therefore it is plainly within the power of the commission, after granting partial relief, to delay further action until it can satisfy itself by actual trial to what extent its waiver should go.⁴⁰ Where a franchise contract provides that a schedule be filed by the company with the municipality and the state commission, to stand only if the municipality accepts it, and if not, to be changed by the state commission, rates prescribed by the state commission are fixed by the state and may be assailed as confiscatory.⁴¹

§ 328. Confiscation Respecting Particular Matters.

No claim of confiscation because of inadequate valuation can be successfully pressed where the valuation claimed to be proper by the complaining party is approximately the same as that complained of.⁴² Likewise, confiscation may not be established by showing minor variations between the agency's determination and the most cogent evidence adduced before it.⁴³ Thus trivial considerations which affect the rate of return are not controlling.⁴⁴

³⁸ *Denney v. Pacific Telephone & Telegraph Co.* (1928) 276 U. S. 97, 72 L. Ed. 483, 48 S. Ct. 223; *Henderson Water Co. v. Corporation Commission* (1925) 269 U. S. 278, 70 L. Ed. 273, 46 S. Ct. 112.

³⁹ *Henderson Water Co. v. Corporation Commission* (1925) 269 U. S. 278, 70 L. Ed. 273, 46 S. Ct. 112.

⁴⁰ *Henderson Water Co. v. Corporation Commission* (1925) 269 U. S. 278, 70 L. Ed. 273, 46 S. Ct. 112.

⁴¹ *Central Kentucky Natural Gas Co. v. Railroad Commission* (1933) 290 U. S. 264, 78 L. Ed. 307, 54 S. Ct. 154.

⁴² *Great Northern R. Co. v. Weeks*, (1936) 297 U. S. 135, 80 L. Ed. 532, 56 S. Ct. 426.

⁴³ *Columbus Gas & Fuel Co. v. Public Utilities Commission* (1934) 292 U. S. 398, 78 L. Ed. 1327, 54 S. Ct. 763, 91 A. L. R. 1403.

⁴⁴ *Columbus Gas & Fuel Co. v. Public Utilities Commission* (1934) 292 U. S. 398, 78 L. Ed. 1327, 54 S. Ct. 763, 91 A. L. R. 1403; *Rowland v. Boyle* (1917) 244 U. S. 106, 61 L. Ed. 1022, 37 S. Ct. 577; *Van Dyke v. Geary* (1914) 218 Fed. 111, *aff'd* (1917) 244 U. S. 39, 61 L. Ed. 973, 37 S. Ct. 483.

An order prescribing divisions may be assailed as confiscatory without assailing the order fixing the rates upon which the divisions are based, since the rates may be reasonable but the prescribed division may be confiscatory.⁴⁵

§ 329. Time as of Which Confiscation Exists.

Confiscation may exist at a particular moment or during all of a particular period because of the conditions existing at that moment or during that period.⁴⁶ Thus rates may be confiscatory at one time and not confiscatory at another, depending upon changes in economic conditions.⁴⁷ For instance, where a rate prescribed in 1923 is litigated until 1930, the Supreme Court may consider whether the rate was confiscatory for each intervening year.⁴⁸ A rate-order once presumably proper as to the amount of rates fixed thereby may be shown to have become confiscatory by reason of changed conditions.⁴⁹

The confiscatory or non-confiscatory nature of a prescribed rate must be determined, not as of the date of the administrative order, but as of the date and circumstances of the trial in the trial court, both where a prescribed new rate has never been in effect,⁵⁰ and where the prescribed new rate has been in effect despite the litigation.⁵¹ Upon remand to the District Court after appeal for a new hearing on the issue of confiscation, the prescribed new rates must be tested as of the date and circumstances of the subsequent trial *de novo*.⁵²

§ 330. — Past and Future Conditions Must Nevertheless Be Considered.

In deciding the issue of confiscation, the agency may not be reprimanded for considering evidence of conditions over varying periods. The agency may not be confined to evidence as to their operation of the rates in question at the precise time of the adminis-

⁴⁵ *Baltimore & O. R. Co. v. United States* (1936) 298 U. S. 349, 80 L. Ed. 1209, 56 S. Ct. 797.

⁴⁶ *United Railways & Electric Co. v. West* (1930) 280 U. S. 234, 74 L. Ed. 390, 50 S. Ct. 123. See *Knoxville v. Knoxville Water Co.* (1909) 212 U. S. 1, 53 L. Ed. 371, 29 S. Ct. 148.

⁴⁷ *Lincoln Gas & Electric Light Co. v. Lincoln* (1919) 250 U. S. 256, 63 L. Ed. 968, 39 S. Ct. 454.

⁴⁸ *Smith v. Illinois Bell Telephone Co.* (1930) 282 U. S. 133, 75 L. Ed. 255, 51 S. Ct. 65.

⁴⁹ *Banton v. Belt Line R. Corp.* (1925) 268 U. S. 413, 69 L. Ed. 1020, 45 S. Ct. 534.

⁵⁰ *United Gas Public Service Co. v. Texas* (1938) 303 U. S. 123, 82 L. Ed. 702, 58 S. Ct. 483, rehearing denied 303 U. S. 667, 82 L. Ed. 1124, 58 S. Ct. —.

⁵¹ *McCart v. Indianapolis Water Co.* (1938) 302 U. S. 419, 82 L. Ed. 336, 58 S. Ct. 324.

⁵² *McCart v. Indianapolis Water Co.* (1938) 302 U. S. 419, 82 L. Ed. 336, 58 S. Ct. 324.

trative hearing, or in the months, or even a year, immediately prior thereto. It is entitled to consider the conditions which obtained at the time of hearing, and to extend its examination over such a reasonable period of past operations as will enable it to make a fair prediction in fixing maximum rates to be charged in the future. A period of six years has been held to be reasonable.⁵³

Moreover in every confiscation case the future as well as the present must be regarded. The rate of return must be calculated to yield the proper amount in the future as well as for the particular time it takes effect.⁵⁴ However, an agency may not prescribe a presently confiscatory rate because higher rates will produce excessive returns after completion of an expected expansion. The agency must fix reasonable rates presently productive of a fair return.⁵⁵

§ 331. Question May Be Raised Only Respecting Particular Rates Specifically Prescribed.

The question of confiscation may be raised only respecting particular rates prescribed by a particular order, ordinance or statute,⁵⁶ and only by pleading facts which show deprivation of a particular party of its property. Pleading facts applicable to a group does not suffice.⁵⁷ The question may not be raised respecting a preliminary order which does not fix rates, although it may form the basis of a subsequent rate order.⁵⁸ This rule applies to an order prescribing forms of accounts to be kept which may be the basis of a subsequent rate order which might be confiscatory. The question of confiscation may not be raised upon judicial review of the accounting order.⁵⁹ On complaint as to the confiscatory character of rates fixed by law, the utility has a right to test the rates as a unit. But this broader right does not, unless availed of, exclude the narrower one to resist in each particular case an individual effort to enforce a single rate.⁶⁰

⁵³ *St. Joseph Stock Yards Co. v. United States* (1936) 298 U. S. 38, 80 L. Ed. 1033, 56 S. Ct. 720.

⁵⁴ *McCardle v. Indianapolis Water Co.* (1926) 272 U. S. 400, 71 L. Ed. 316, 47 S. Ct. 144.

⁵⁵ *Great Falls Gas Co. v. Public Service Commission* (D. C. D. Mont., 1929) 34 F. (2d) 297.

⁵⁶ *Knoxville v. Knoxville Water Co.* (1909) 212 U. S. 1, 53 L. Ed. 371, 29 S. Ct. 148.

⁵⁷ *American Commission Co. v. United States* (D. C. Colo., 1935) 11 F. Supp. 965.

⁵⁸ *Norfolk & W. R. Co. v. United States* (1932) 287 U. S. 134, 77 L. Ed. 218, 53 S. Ct. 52.

⁵⁹ *Norfolk & W. R. Co. v. United States* (1932) 287 U. S. 134, 77 L. Ed. 218, 53 S. Ct. 52.

⁶⁰ *Missouri v. Chicago, B. & Q. R. Co.* (1916) 241 U. S. 533, 60 L. Ed. 1148, 36 S. Ct. 715.

Similarly where certain rates only are reduced and assailed as confiscatory, it must be shown that they are too low, not merely that all revenues are inadequate. No claim of confiscation can be made without allocating to the rates in question proper operating expenses and financial charges.⁶¹ Confiscation cannot be shown as to a particular item or class of traffic by showing only the relation of the total operating expenses of a railroad, or a division of a railroad to the entire receipts of that road or division.⁶² There must be evidence with respect to the particular item or class of traffic.⁶³ Where a company had a practice of granting five per cent. discount for prompt payment of bills it was error to assume that such practice would continue under the new, lowered rates, and that the utility would not receive the full amount of the required rates.⁶⁴

§ 332. — Confiscation Cannot Be Shown from the Rates Prescribed for Others.

If a carrier receives a fair return, it makes no difference, so far as the question of confiscation is concerned, that competing carriers are permitted to charge higher rates for a service which costs them more to render and from which they receive no better net return.⁶⁵ The same rate in the same territory may be adequate as to one carrier, and confiscatory as to another which is put to greater expense in rendering the service.⁶⁶ The apportionment of joint rates on the basis of the greater needs of particular carriers is not unconstitutional where the amount left to the less needy is still not confiscatory.⁶⁷

A company supplying gas to local companies, which is itself not compelled to accept unremunerative prices, cannot complain that the rates prescribed for local companies buying from it are confiscatory, even where sale to such companies is its sole business.⁶⁸ Where rates

⁶¹ *American Toll Bridge Co. v. Railroad Commission* (1939) 307 U. S. 486, 83 L. Ed. 1414 59 S. Ct. 948.

⁶² *Wood v. Vandalia R. Co.* (1913) 231 U. S. 1, 58 L. Ed. 97, 34 S. Ct. 7.

⁶³ *Wood v. Vandalia R. Co.* (1913) 231 U. S. 1, 58 L. Ed. 97, 34 S. Ct. 7.

⁶⁴ *Knoxville v. Knoxville Water Co.* (1909) 212 U. S. 1, 53 L. Ed. 371, 29 S. Ct. 148.

⁶⁵ *Dayton-Goose Creek R. Co. v. United States* (1924) 263 U. S. 456,

68 L. Ed. 388, 44 S. Ct. 169, 33 A. L. R. 472.

⁶⁶ *Dayton-Goose Creek R. Co. v. United States* (1924) 263 U. S. 456, 68 L. Ed. 388, 44 S. Ct. 169, 33 A. L. R. 472.

⁶⁷ *The New England Divisions Case* (1923) 261 U. S. 184, 67 L. Ed. 605, 43 S. Ct. 270.

⁶⁸ *Public Utilities Commission v. Landon* (1919) 249 U. S. 236, 63 L. Ed. 577, 39 S. Ct. 268.

are computed on the aggregate earnings of all stock fire insurance companies in a state, and are applicable to all alike, a suit by all the companies, alleging that rates are too low in the aggregate, without more, will not succeed.⁶⁹ The burden of alleging confiscation is not sustained by a complaint which does not allege confiscation as to any company of the group suing, nor any joint interest between them, nor that each is so well and economically organized and carried on that all are entitled, as of right protected by the Constitution, to premiums amounting in the aggregate to enough to yield a reasonable return to all the companies. No opinion has been given as to whether, on any state of facts, all would be jointly entitled to such protection.⁷⁰ No company receiving just compensation is entitled to have higher rates merely because of the plight of its less fortunate competitors. Companies whose constitutional rights are not infringed may not better their position by urging the cause of others.⁷¹ And since the Fourteenth Amendment does not protect against competition, companies as to which rates are confiscatory have no constitutional right to prevent their prescription for companies as to which the rates are not confiscatory.⁷² It has never been held and cannot reasonably be held that state-made rates violate the Fourteenth Amendment merely because the aggregate collections are not sufficient to yield a reasonable profit or just compensation to all companies that happen to be engaged in the affected business. Aggregate collections sufficient to yield a reasonable profit for all do not necessarily give each just compensation.⁷³

§ 333. Profitable Service May Not Be Joined with Non-Compensatory Service.

A profitable service may not be joined by a rate-making agency with one that is operated at a confiscatory rate on the theory that the combined rate is not confiscatory.⁷⁴ Yet the discretion to fix rates is wide. Uniform rates for all commodities need not be fixed, nor the

⁶⁹ Aetna Ins. Co. v. Hyde (1928) 275 U. S. 440, 72 L. Ed. 357, 48 S. Ct. 174.

⁷⁰ Aetna Ins. Co. v. Hyde (1928) 275 U. S. 440, 72 L. Ed. 357, 48 S. Ct. 174.

⁷¹ Aetna Ins. Co. v. Hyde (1928) 275 U. S. 440, 72 L. Ed. 357, 48 S. Ct. 174.

⁷² Aetna Ins. Co. v. Hyde (1928)

275 U. S. 440, 72 L. Ed. 357, 48 S. Ct. 174.

⁷³ Aetna Ins. Co. v. Hyde (1928) 275 U. S. 440, 72 L. Ed. 357, 48 S. Ct. 174.

⁷⁴ Chicago, M. & St. P. R. Co. v. Public Utilities Commission (1927) 274 U. S. 344, 71 L. Ed. 1085, 47 S. Ct. 604.

same percentage of profit secured on every sort of business. Separate rates need not be prescribed for every individual service performed; services may be grouped by fixing classes of rates for traffic. But a different question arises when the state has segregated a commodity or a class of traffic, and has attempted to compel the carrier to transport it at a loss or without substantial compensation even though the intrastate business as a whole is remunerative.⁷⁵ And a state has no power to compel a railroad to haul logs between intrastate points at a loss or without reasonable and just compensation, even though the road receives adequate revenues from the intrastate log haul and the interstate lumber haul, combined.⁷⁶ The state cannot justify unreasonably low rates for domestic transportation, considered alone, upon the ground that the carrier is earning large profits on its interstate business. On the other hand the carrier cannot justify unreasonably high rates on domestic business on the ground that only in that way is it able to meet losses on its interstate business.⁷⁷ However, there is no constitutional objection to the maintenance of a non-compensatory fare upon an individual trivial part of a strutt-railway system, provided it is an integral part of the system and the rates on the system as a whole are not confiscatory.⁷⁸

§ 334. Temporary Orders: Where Experimental.

Although an order is intended to be in effect only temporarily, if it is confiscatory its enforcement will be enjoined.⁷⁹ Unless there is clear proof, however, that rates proposed in an order avowedly experimental, and of limited duration, are confiscatory, such as proof that the prescribed rates are lower than existing rates not compensatory,⁸⁰

⁷⁵ *Vandalia R. Co. v. Schnull* (1921) 255 U. S. 113, 65 L. Ed. 539, 41 S. Ct. 324.

⁷⁶ *Chicago, M. & St. P. R. Co. v. Public Utilities Commission* (1927) 274 U. S. 344, 71 L. Ed. 1085, 47 S. Ct. 604.

⁷⁷ *Dayton-Goose Creek R. Co. v. United States* (1924) 263 U. S. 456, 68 L. Ed. 388, 44 S. Ct. 169, 33 A. L. R. 472.

⁷⁸ *United Railways & Electric Co. v. West* (1930) 280 U. S. 234, 74 L. Ed. 390, 50 S. Ct. 123; *Puget Sound*

Traction, Light & Power Co. v. Reynolds (1917) 244 U. S. 574, 61 L. Ed. 1325, 37 S. Ct. 705, 5 A. L. R. 13.

⁷⁹ *Mountain States Telephone & Telegraph Co. v. Public Utility Commission* (D. C. Utah, Cent. Div., 1934) 8 F. Supp. 307.

⁸⁰ *Northern Pac. R. Co. v. Department of Public Works* (1925) 268 U. S. 39; 69 L. Ed. 836, 45 S. Ct. 412; *Mountain States Telephone & Telegraph Co. v. Public Utilities Commission* (D. C. Utah, Cent. Div., 1934) 8 F. Supp. 307.

such an order will be considered valid for a reasonable test period.⁸¹ Thus where half the increase requested by a utility is granted for six months, with a direction that the company can then apply again for such relief as results justify, there is no confiscation necessarily. Such a reasonable delay does not infringe any constitutional rights to be protected against confiscation.⁸²

§ 335. Significance of Fixing Maximum and Minimum Rates Distinguished: Competition.

A regulation fixing minimum prices under which a business is unable, in competition with others subject to the same regulation, to earn a fair return on fair value, is not confiscatory.⁸³ The analogy to a public utility is unreal. The utility whose maximum rates are

⁸¹ *Clark's Ferry Bridge Co. v. Public Service Commission* (1934) 291 U. S. 227, 78 L. Ed. 767, 54 S. Ct. 427. See *Northern Pac. R. Co. v. Department of Public Works* (1925) 268 U. S. 39, 69 L. Ed. 837, 45 S. Ct. 412.

⁸² *Henderson Water Co. v. Corporation Commission* (1925) 269 U. S. 278, 70 L. Ed. 273, 46 S. Ct. 112.

⁸³ *Hegeman Farms Corp. v. Baldwin* (1934) 293 U. S. 163, 79 L. Ed. 259, 55 S. Ct. 7.

"The gravamen of its complaint is that the enforcement of the order will deprive it of the 'right of competition in rates essential to protection and preservation of its property and business,' and of the 'right to charge rates concededly less than reasonable rates.' The demand for gas in the community served is not sufficient to require both systems, and there is no suggestion that it is likely to become great enough to justify the expenditures made for them. The facts disclosed by the record compel the conclusion that, if competition shall continue in the future as in the past, appellee will not be able upon any rates within constitutional protection against reduction to earn a reasonable

return upon the value of its property employed in the public service. The due process clause of the Fourteenth Amendment safeguards against the taking of private property, or the compelling of its use, for the service of the public without just compensation. *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 410. *Smyth v. Ames*, 169 U. S. 466, 546. *Willecox v. Consolidated Gas Co.*, 212 U. S. 19, 41. *Missouri Pacific Ry. Co. v. Tucker*, 230 U. S. 340, 347. *Minnesota Rate Cases*, 230 U. S. 352, 434. *Board of Comm'rs. v. N. Y. Tel. Co.*, 271 U. S. 23, 31. But it does not assure to public utilities the right under all circumstances to have a return upon the value of the property so used. The loss of, or the failure to obtain, patronage, due to competition, does not justify the imposition of charges that are exorbitant and unjust to the public. The clause of the Constitution here invoked does not protect public utilities against such business hazards." (Mr. Justice Butler in *Public Service Commission of Montana v. Great Northern Utilities Co.* (1933) 289 U. S. 130, 134, 135, 77 L. Ed. 1080, 53 S. Ct. 546.)

fixed has no escape. But the industry whose minimum prices are fixed can raise the price to a figure which will give a fair return. The weaker members of the group may be unable to keep pace with the stronger, but it is their relative efficiency, and not the compulsion of the minimum price regulation, which eliminates them. Thus where a regulation fixed minimum cost and sales prices of milk, and competition held the maximum sales price at the fixed minimum figure, a dealer who made no showing as to his efficiency could not claim confiscation solely because the "spread" between the prices was insufficient to give him a fair return on the fair value of his property.⁸⁴ If the price fixing is within the police power, which is not, as sometimes earlier said, limited to "health" and "safety,"⁸⁵ the regulation must be borne. The Fourteenth Amendment does not protect a business against the hazards of competition.⁸⁶ If a regulation favors the strong and eliminates the weak, this is a matter of legislative policy with which courts are not concerned.⁸⁷

II. JUDICIAL NATURE OF THE QUESTION OF CONFISCATION

§ 336. Confiscation a Prime Judicial Question.

It is not the province of the courts to enter upon the merely administrative duty of framing a tariff or rate.⁸⁸ But conversely it is not for the legislature to determine what shall be the measure of compensation for the taking of private property for public use, for that is a judicial and not a legislative question.⁸⁹ It is within the scope of judicial power and a part of judicial duty to restrain anything which, in the form of a regulation of rates, operates to deny to the owners of property invested in a business devoted to public use the equal protection which is the constitutional right of all owners of other

⁸⁴ *Hegeman Farms Corp. v. Baldwin* (1934) 293 U. S. 163, 79 L. Ed. 259, 55 S. Ct. 7.

⁸⁵ *Hegeman Farms Corp. v. Baldwin* (1934) 6 F. Supp. 297, aff'd 293 U. S. 163, 79 L. Ed. 259, 55 S. Ct. 7.

⁸⁶ *Hegeman Farms Corp. v. Baldwin* (1934) 293 U. S. 163, 79 L. Ed. 259, 55 S. Ct. 7.

⁸⁷ *Hegeman Farms Corp. v. Baldwin* (1934) 293 U. S. 163, 79 L. Ed. 259, 55 S. Ct. 7.

⁸⁸ *Baltimore & O. R. Co. v. United States* (1936) 298 U. S. 349, 80 L. Ed.

1209, 56 S. Ct. 797; *West v. Chesapeake & Potomac Telephone Co.* (1935) 295 U. S. 662, 79 L. Ed. 1640, 55 S. Ct. 894; *Los Angeles Gas & Electric Corp. v. Railroad Commission* (1933) 289 U. S. 287, 77 L. Ed. 1180, 53 S. Ct. 637. See § 505 et seq.

⁸⁹ *Baltimore & O. R. Co. v. United States* (1936) 298 U. S. 349, 80 L. Ed. 1209, 56 S. Ct. 797; *Los Angeles Gas & Electric Corp. v. Railroad Commission* (1933) 289 U. S. 287, 77 L. Ed. 1180, 53 S. Ct. 637.

property.⁹⁰ Confiscation questions are illustrative of the rule that in cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function.⁹¹ In view of the character of the judicial power invoked in such cases it is not tolerable that its exercise should rest securely upon the findings of a master even though they be confirmed by the trial court. The power is best safeguarded against abuse by preserving to the Supreme Court complete freedom in dealing with the facts of each case.⁹² A state must clearly provide a fair opportunity for the independent judgment of a court upon the facts and the law when confiscation is alleged. Otherwise the order in question is void.⁹³ Disposition of a cause without passing on the question of confiscation, when it has been properly raised, is error.⁹⁴

§ 337. State Cases.

Where an order of a state administrative agency is assailed as confiscatory, the one federal question raised is whether the action of the state officials in the totality of its consequences is consistent with the enjoyment by the regulated utility of a revenue something higher than the line of confiscation.⁹⁵ In deciding whether constitutional

⁹⁰ *Baltimore & O. R. Co. v. United States* (1936) 298 U. S. 349, 80 L. Ed. 1209, 56 S. Ct. 797; *Smyth v. Ames* (1898) 169 U. S. 466, 42 L. Ed. 819, 18 S. Ct. 418; *Covington & L. T. R. Co. v. Sandford* (1896) 164 U. S. 578, 41 L. Ed. 560, 17 S. Ct. 198.

⁹¹ *Crowell v. Benson* (1932) 285 U. S. 22, 76 L. Ed. 598, 52 S. Ct. 285; *Bluefield Waterworks & Improvement Co. v. Public Service Commission* (1923) 262 U. S. 679, 67 L. Ed. 1176, 43 S. Ct. 675; *San Diego Land & Town Co. v. National City* (1899) 174 U. S. 739, 43 L. Ed. 1154, 19 S. Ct. 804. See also § 262 et seq.

⁹² *Knoxville v. Knoxville Water Co.* (1909) 212 U. S. 1, 53 L. Ed. 371, 29 S. Ct. 148.

⁹³ *Ohio Valley Water Co. v. Ben Avon Borough* (1920) 253 U. S. 287, 64 L. Ed. 908, 40 S. Ct. 527.

⁹⁴ *Wichita Railroad & Light Co. v. Public Utilities Commission* (1922) 260 U. S. 48, 67 L. Ed. 124, 43 S. Ct. 51.

⁹⁵ *Driscoll v. Edison Light & Power Co.* (1939) 307 U. S. 104, 83 L. Ed. 1134, 59 S. Ct. 715, rehearing denied 307 U. S. 650, 83 L. Ed. 1529, 59 S. Ct. 831; *United Gas Public Service Co. v. Texas* (1938) 303 U. S. 123, 82 L. Ed. 702, 58 S. Ct. 483, rehearing denied 303 U. S. 667, 82 L. Ed. 1124, 58 S. Ct. —; *Railroad Commission of California v. Pacific Gas & Electric Co.* (1938) 302 U. S. 388, 82 L. Ed. 319, 58 S. Ct. 334; *West v. Chesapeake & Potomac Telephone Co.* (1935) 295 U. S. 662, 79 L. Ed. 1640, 55 S. Ct. 894; *West Ohio Gas Co. v. Public Utilities Commission of Ohio* (1935) 294 U. S. 63, 79 L. Ed. 761, 55 S. Ct. 316; *Lindheimer v. Illinois Bell Tele-*

rights have been withheld, the Supreme Court may pass upon matters of state law which are involved.⁹⁶ Thus where a claim of confiscation involves questions of state law, the federal courts may pass on the interwoven questions of state law.⁹⁷ The Supreme Court will review the findings of fact of a state court, (1) where a federal right has been denied as the result of a finding shown by the record to be without evidence to support it, and (2) where a conclusion of law as to a federal right and findings of fact are so intermingled as to make it necessary, in order to pass upon the federal question, to analyze the facts.⁹⁸

§ 338. Case Must Be Clear.

It is fundamental that the judicial power to declare legislative action invalid on constitutional grounds is to be exercised only in clear cases.⁹⁹ The constitutional invalidity must be manifest and if it rests on disputed questions of fact, the invalidating facts, such as asserted value, must be proved.¹ It is well-established that in a question of rate-making there is a strong presumption in favor of the conclusions reached by an experienced administrative body after a full hearing.² Especially must confiscation be clearly shown when it is

phone Co. (1934) 292 U. S. 151, 78 L. Ed. 1182, 54 S. Ct. 658; Greencastle Water Works Co. v. Public Service Commission (D. C. S. D. Ind., 1929) 31 F. (2d) 600.

⁹⁶ United Fuel Gas Co. v. Railroad Commission (1929) 278 U. S. 300, 73 L. Ed. 390, 49 S. Ct. 150.

⁹⁷ United Fuel Gas Co. v. Railroad Commission (1929) 278 U. S. 300, 73 L. Ed. 390, 49 S. Ct. 150; Denney v. Pacific Telephone & Telegraph Co. (1928) 276 U. S. 97, 72 L. Ed. 483, 48 S. Ct. 223.

⁹⁸ United Gas Public Service Co. v. Texas (1938) 303 U. S. 123, 143, 82 L. Ed. 702, 58 S. Ct. 483, rehearing denied 303 U. S. 667, 82 L. Ed. 1124, 58 S. Ct. —. See Norris v. Alabama (1935) 294 U. S. 587, 79 L. Ed. 1074, 55 S. Ct. 579.

⁹⁹ Secretary of Agriculture.

Union Stock Yards Co. of Omaha v. United States (D. C. Neb., Omaha Div., 1934) 9 F. Supp. 864.

State Agencies.

Aetna Ins. Co. v. Hyde (1928) 275 U. S. 440, 72 L. Ed. 357, 48 S. Ct. 174; Van Dyke v. Geary (1917) 244 U. S. 39, 64 L. Ed. 973, 37 S. Ct. 483; The Missouri Rate Cases (1913) 230 U. S. 474, 57 L. Ed. 1571, 33 S. Ct. 975; Willcox v. Consolidated Gas Co. (1909) 212 U. S. 19, 53 L. Ed. 382, 29 S. Ct. 192.

¹ Los Angeles Gas & Electric Corp. v. Railroad Commission (1933) 289 U. S. 287, 77 L. Ed. 1180, 53 S. Ct. 637; The Minnesota Rate Cases (1913) 230 U. S. 352, 57 L. Ed. 1511, 33 S. Ct. 729; Knoxville v. Knoxville Water Co. (1909) 212 U. S. 1, 53 L. Ed. 371, 29 S. Ct. 148; San Diego Land & Town Co. v. National City (1899) 174 U. S. 739, 43 L. Ed. 1154, 19 S. Ct. 804.

² Darnell v. Edwards (1917) 244 U. S. 564, 61 L. Ed. 1317, 37 S. Ct. 701. See § 755.

asserted against rates which have never been in force.³ The courts have plainly indicated that the validity of prescribed rates assailed as confiscatory can be ascertained most clearly where such rates have been made effective, since an actual test of the rate provides known conditions instead of speculation as a basis for judgment as to the rate's confiscatory effect.⁴

The Supreme Court has frequently said, especially in confiscation cases, that a mere allegation of repugnance to the Fourteenth Amendment is not enough to state a cause of action to restrain the enforcement of a statute or administrative order.⁵

§ 339. Confiscation a Single Issue: Limitation of Court's Function.

The question of confiscation is a single question to be decided by the courts. Decision of that question does not bring up for review *de novo* the entire administrative determination or group of determinations. It does, however, bring up for trial *de novo* all administrative questions upon which the question of confiscation depends.⁶ Findings of primary fact made by an administrative agency will not even then be disturbed save as in particular instances they are plainly shown to be overborne by weight of the evidence.⁷ The rule of administrative finality does not then apply to such administrative findings.⁸

It is not the function of the court to do the work of the agency by determining a rate base upon correct principles. Upon finding that the agency reached its conclusions as to value from data which furnished no legal support, the court should enjoin the enforcement of the rate order.⁹ The fixing of utility rates is a legislative function, not within the judicial power, and so the court will not review the actions of an agency, in a confiscation case, for the purpose of substituting its own judgment for that of the agency.¹⁰

³ Willcox v. Consolidated Gas Co. (1909) 212 U. S. 19, 53 L. Ed. 382, 29 S. Ct. 192.

⁴ McCart v. Indianapolis Water Co. (1938) 302 U. S. 419, 82 L. Ed. 336, 58 S. Ct. 324; Brush Electric Co. v. Galveston (1923) 262 U. S. 443, 67 L. Ed. 1076, 43 S. Ct. 606.

⁵ See § 727.

⁶ See § 262 et seq.

⁷ St. Joseph Stock Yards Co. v.

United States (1936) 298 U. S. 38, 80 L. Ed. 1033, 56 S. Ct. 720.

⁸ See § 262 et seq.

⁹ West v. Chesapeake & Potomac Telephone Co. (1935) 295 U. S. 662, 79 L. Ed. 1640, 55 S. Ct. 894. See also § 788 et seq.

¹⁰ Greencastle Water Works Co. v. Public Service Commission (D. C. S. D. Ind., 1929) 31 F. (2d) 600; Union Stock Yards Co. of Omaha v. United

§ 340. — Minor Errors: Set-Off of Compensating Errors.

Even where an agency has improperly ignored certain factors which it should have considered, its determination will stand where other items neutralize or compensate the error.¹¹ The fact that in confiscation cases the reviewing court is deciding a single issue is a controlling principle.¹²

§ 341. Questions of Procedural Due Process Are Separate.

The guaranty of the Constitution extends to the substance of an order as well as to the notice and hearing which precede it. The mere form of proceeding instituted against an owner, even if it admit him to defend, cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation.¹³ An administrative order may of course be attacked separately on the ground that the complaining party was denied the requisites of procedural due process in the administrative proceedings. But these are separate questions. Questions of procedural due process go to the validity of the proceedings resulting in the administrative determination, while the question of confiscation goes to the validity of the result of the legislative process.¹⁴

III ADMINISTRATIVE REASONING; AND METHODS OF PROOF

§ 342. Methods of Reasoning.

Many cases speak of the "method" used by an administrative agency in reaching a result, in terms which do not always clearly indicate whether there is meant an agency's method of reasoning from evidence, or the method or legal theory of proof used to ascertain the type of evidence which is admissible and entitled to be considered. The two senses are separate. The legislative discretion implied in

States (D. C. Neb., Omaha Div., 1934) 9 F. Supp. 864.

¹¹ Secretary of Agriculture.

Union Stock Yards Co. of Omaha v. United States (D. C. Neb., Omaha Div., 1934) 9 F. Supp. 864.

State Agencies.

West v. Chesapeake & Potomac Telephone Co. (1935) 295 U. S. 662, 79 L. Ed. 1640, 55 S. Ct. 894; Dayton Power & Light Co. v. Public Utilities Commission (1934) 292 U. S. 290, 78 L. Ed. 1267, 54 S. Ct. 647; Los Angeles

Gas & Electric Corp. v. Railroad Commission (1933) 289 U. S. 287, 77 L. Ed. 1180, 53 S. Ct. 637; Lincoln Gas & Electric Light Co. v. Lincoln (1919) 250 U. S. 256, 63 L. Ed. 968, 39 S. Ct. 454.

¹² See § 339.

¹³ Washington ex rel. Oregon R. & Nav. Co. v. Fairchild (1912) 224 U. S. 510, 56 L. Ed. 863, 32 S. Ct. 535.

¹⁴ West v. Chesapeake & Potomac Telephone Co. (1935) 295 U. S. 662, 79 L. Ed. 1640, 55 S. Ct. 894.

the rate-making power necessarily extends to the entire legislative process, embracing the method used in reaching the legislative determination as well as that determination itself. The federal courts are only concerned with the constitutional, or judicial question, of the validity of the result. They do not sit as a board of revision, but to enforce constitutional rights.¹⁵ If confiscation only is alleged, it is the sole issue, and the agency's method of reasoning from evidence, used in reaching an administrative determination, does not concern the court except as it may throw light upon the validity of the result reached. If the action of the agency in the totality of its consequences is not confiscatory and there is no denial of procedural due process, there is no denial of due process even though the administrative proceeding is shot through with irregularity or error so far as the agency's method of reasoning from the evidence is concerned.¹⁶ The court is only concerned with the question of whether the result is confiscation.

An agency's error in treating particular evidence as without probative value and so refusing to consider it, is not necessarily *per se* a denial of due process.¹⁷ But an administrative agency may not refuse to consider such evidence where refusal to do so is arbitrary or results in an arbitrary determination.¹⁸ In no event may an agency found a finding upon evidence which has no probative value, for to do so, especially in the face of competent evidence to the contrary, would be arbitrary action and a denial of due process.¹⁹

15 Secretary of Agriculture.

Union Stock Yards Co. of Omaha v. United States (D. C. Neb., Omaha Div., 1934) 9 F. Supp. 864.

State Agencies.

Railroad Commission of California v. Pacific Gas & Electric Co. (1938) 302 U. S. 388, 82 L. Ed. 319, 58 S. Ct. 334; West v. Chesapeake & Potomac Telephone Co. (1935) 295 U. S. 662, 79 L. Ed. 1640, 55 S. Ct. 894; Clark's Ferry Bridge Co. v. Public Service Commission (1934) 291 U. S. 227, 78 L. Ed. 767, 54 S. Ct. 427; Los Angeles Gas & Electric Corp. v. Railroad Commission (1933) 289 U. S. 287, 77 L. Ed. 1180, 53 S. Ct. 637.

¹⁶ Railroad Commission of California v. Pacific Gas & Electric Co. (1938) 302 U. S. 388, 82 L. Ed. 319, 58 S. Ct. 334; West v. Chesapeake & Potomac Telephone Co. (1935) 295 U. S.

662, 79 L. Ed. 1640, 55 S. Ct. 894; West Ohio Gas Co. v. Public Utilities Commission of Ohio (1935) 294 U. S. 63, 79 L. Ed. 761, 55 S. Ct. 316.

¹⁷ Railroad Commission of California v. Pacific Gas & Electric Co. (1938) 302 U. S. 388, 82 L. Ed. 319, 58 S. Ct. 334; West v. Chesapeake & Potomac Telephone Co. (1935) 295 U. S. 662, 79 L. Ed. 1640, 55 S. Ct. 894.

¹⁸ Columbus Gas & Fuel Co. v. Public Utilities Commission of Ohio (1934) 292 U. S. 398, 78 L. Ed. 1327, 54 S. Ct. 763, 91 A. L. R. 1403.

¹⁹ Railroad Commission of California v. Pacific Gas & Electric Co. (1938) 302 U. S. 388, 82 L. Ed. 319, 58 S. Ct. 334; West v. Chesapeake & Potomac Telephone Co. (1935) 295 U. S. 662, 79 L. Ed. 1640, 55 S. Ct. 894. See also § 575 et seq.

§ 343. Method or Legal Theory of Proof a Judicial Question.

Method, however, so far as it is a matter of deciding what evidence is proper to make proof and should therefore be admitted and considered, is a judicial question.²⁰ In other words, certain evidence has probative value as a matter of law. Conversely proof (which is the result of evidence) of particular matters may be made by the receipt of particular types of evidence as a matter of law. The most common example of this in administrative law is in respect of value. As a matter of law valuation of a rate base may be proven by evidence of both historical and reproduction cost. Both have probative force as to value as a matter of law.²¹ Thus evidence as to either is admissible, and so must be considered by the agency, as a matter of law, and an agency's refusal to admit or consider competent evidence of either type of cost is an error of law vitiating the entire result. In other words, the method or legal theory of proof of value has been erroneous as a matter of law. This may easily result in confiscation, and hence where confiscation is alleged the administrative method or legal theory of proof may be inquired into to see if it necessarily results in confiscation,²² even though the agency's determination might have been sustained upon some different theory of valuation.²³ Error is fundamental where the entire method is erroneous, and its use necessarily involves unjust and inaccurate results, as where historical and reproduction cost are ignored, and valuation is made by use of commodity price indices,²⁴ or where the agency uses a forecast in preference to a survey.²⁵ If the error found is not so fundamental as to result in confiscation, it is not of judicial concern.²⁶

²⁰ *West v. Chesapeake & Potomac Telephone Co.* (1935) 295 U. S. 662, 79 L. Ed. 1640, 55 S. Ct. 894; *Chicago, M. & St. P. R. Co. v. Public Utilities Commission* (1927) 274 U. S. 344, 71 L. Ed. 1085, 47 S. Ct. 604.

²¹ See § 350 et seq.

²² *Railroad Commission of California v. Pacific Gas & Electric Co.* (1938) 302 U. S. 388, 82 L. Ed. 319, 58 S. Ct. 334; *West v. Chesapeake & Potomac Telephone Co.* (1935) 295 U. S. 662, 79 L. Ed. 1640, 55 S. Ct. 894; *Los Angeles Gas & Electric Corp. v. Railroad Commission* (1933) 289 U. S. 287, 77 L. Ed. 1180, 53 S. Ct. 637; *Chicago, M. & St. P. R. Co. v. Public Utilities Commission* (1927)

274 U. S. 344, 71 L. Ed. 1085, 47 S. Ct. 604; *Northern Pac. R. Co. v. Department of Public Works* (1925) 268 U. S. 39, 69 L. Ed. 837, 45 S. Ct. 412. See *Smyth v. Ames* (1898) 169 U. S. 466, 42 L. Ed. 819, 18 S. Ct. 418.

²³ *West v. Chesapeake & Potomac Telephone Co.* (1935) 295 U. S. 662, 79 L. Ed. 1640, 55 S. Ct. 894.

²⁴ *West v. Chesapeake & Potomac Telephone Co.* (1935) 295 U. S. 662, 79 L. Ed. 1640, 55 S. Ct. 894.

²⁵ *West Ohio Gas Co. v. Public Utilities Commission of Ohio* (1935) 294 U. S. 63, 79 L. Ed. 761, 55 S. Ct. 316.

²⁶ *West v. Chesapeake & Potomac Telephone Co.* (1935) 295 U. S. 662, 79 L. Ed. 1640, 55 S. Ct. 894.

IV. THE RATE BASE

A. *Composition of the Rate Base*

§ 344. Peculiar Nature of Most Utility Property.

In determining fair value of utility property the criteria at hand for ascertaining market value, or what is called exchange value, are not commonly available.²⁷ It must be remembered that most utility property is a great integrated aggregate of many and diverse elements; is not primarily intended for sale in the market, but for devotion to the public use now and for the indefinite future; and has, so far as its market value is concerned, no real resemblance to a bushel of wheat or a ton of iron. Therefore, while general declines and rises in prices must be assumed or may be taken advantage of by the utility, it is unfair and impractical to adjust value, and consequent rate of return, to sudden fluctuations in the price level.²⁸ Of course such considerations do not apply where the utility is one structure, such as a bridge, without additions or improvements.²⁹

§ 345. Composition of the Rate Base: In General.

The rate base consists of the property of a utility to be valued for the purpose of fixing rates.³⁰ Where the rate concerned is one for a particular type of service, or for service in a particular area, the rate base is the property devoted to that service, or to service in that area.³¹

Composition of the rate base, or inclusion of the property from whose value a proper rate of return can be computed, presents both judicial and administrative questions. The usual basis, in the absence of estoppel or contract, of value for the purpose of rate making, is the fair value of property used and useful by the utility at the time of the inquiry. The rate base is composed of such property as a matter of law.³² What property is "used and useful," however,

²⁷ Los Angeles Gas & Electric Corp. v. Railroad Commission (1933) 289 U. S. 287, 77 L. Ed. 1180, 53 S. Ct. 637.

²⁸ West v. Chesapeake & Potomac Telephone Co. (1935) 295 U. S. 662, 79 L. Ed. 1640, 55 S. Ct. 894.

²⁹ See Clark's Ferry Bridge Co. v. Public Service Commission (1934) 291 U. S. 227, 78 L. Ed. 767, 54 S. Ct. 427.

³⁰ Railroad Commission of California v. Pacific Gas & Electric Co. (1938) 302 U. S. 388, 82 L. Ed. 319, 58 S. Ct. 334.

³¹ Oklahoma Gas & Electric Co. v. Corporation Commission (D. C. W. D. Okla., 1932) 1 F. Supp. 966; Indiana General Service Co. v. McCardle (D. C. S. D. Ind., 1932) 1 F. Supp. 113.

³² Secretary of Agriculture.

Denver Union Stock Yard Co. v. United States (1938) 304 U. S. 470, 82 L. Ed. 1469, 58 S. Ct. 990; St. Joseph Stock Yards Co. v. United States (1936) 298 U. S. 38, 80 L. Ed. 1033, 56 S. Ct. 720.

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ordinarily presents an administrative question, on which an agency has legislative discretion, subject only to the standards applicable to administrative questions,³³ and subject to independent review on the facts by the court where a trial *de novo* is had on a constitutional question such as confiscation.³⁴

If in the proper exercise of its legislative discretion in weighing the evidence the administrative agency has excluded certain property from the rate base, although it could also have properly included the property, it has not been improperly excluded so as to tend to show confiscation,³⁵ unless the evidence shows clearly that the property is "used and useful" or so related to the utility's business as to be properly included in the rate base.³⁶ Under this definition, property used for stock show purposes has been held not to be "used and useful" for the performance of services rendered by a stockyard, even though it attracted buyers by its advertising and educational

(1933) 287 U. S. 488, 77 L. Ed. 447, 53 S. Ct. 234; *Houston v. Southwestern Bell Telephone Co.* (1922) 259 U. S. 318, 66 L. Ed. 961, 42 S. Ct. 486; *Denver v. Denver Union Water Co.* (1918) 246 U. S. 178, 62 L. Ed. 649, 38 S. Ct. 278; *Darnell v. Edwards* (1917) 244 U. S. 564, 61 L. Ed. 1317, 37 S. Ct. 701; *The Minnesota Rate Cases* (1913) 230 U. S. 352, 57 L. Ed. 1511, 33 S. Ct. 729; *Smyth v. Ames* (1898) 169 U. S. 466, 42 L. Ed. 819, 18 S. Ct. 418.

Quotations.

"*The rate base.* As of right safeguarded by the due process clause of the Fifth Amendment, appellant is entitled to rates, not *per se* excessive and extortionate, sufficient to yield a reasonable rate of return upon the value of property used, at the time it is being used, to render the services. *Willeox v. Consolidated Gas Co.*, 212 U. S. 19, 41. *Minnesota Rate Cases*, 230 U. S. 352, 434. *Bluefield Water Works Co. vs. Public Service Comm'n*, 262 U. S. 679, 690. *Board of Commissioners v. New York Tele-*

phone Co., 271 U. S. 23, 31. *McCardle v. Indianapolis Water Co.*, 272 U. S. 400, 414. *Los Angeles Gas Co. v. Railroad Comm'n*, 289 U. S. 287, 305. But it is not entitled to have included any property not used and useful for that purpose. Cf. *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 56." (Mr. Justice Butler in *Denver Union Stock Yard Co. v. United States* (1938) 304 U. S. 470, 475, 82 L. Ed. 1469, 58 S. Ct. 990.)

³³ *Wabash Valley Electric Co. v. Young* (1933) 287 U. S. 488, 77 L. Ed. 447, 53 S. Ct. 234; *Union Stock Yards Co. of Omaha v. United States* (D. C. Neb., Omaha Div., 1934) 9 F. Supp. 864. See § 505 et seq.

³⁴ See § 262 et seq.

³⁵ *United Gas Public Service Co. v. Texas* (1938) 303 U. S. 123, 82 L. Ed. 702, 58 S. Ct. 483, rehearing denied 303 U. S. 667, 82 L. Ed. 1124, 58 S. Ct. —.

³⁶ *St. Joseph Stock Yards Co. v. United States* (1936) 298 U. S. 38, 80 L. Ed. 1033, 56 S. Ct. 720.

value, and did in fact stimulate the yard's business.³⁷ Property used for trackage, loading and unloading facilities supplementary to a stockyard's service, are properly excludable since stockyard services do not begin until unloading ends and stop when loading begins, and where the stockyard was paid substantial sums by carriers for the extra services of loading and unloading.³⁸ A gas manufacturing plant, properly part of the actual cost of the utility prudently invested, is no longer "used and useful," where the subsequent discovery of natural gas results in its disuse for several years, and the probability that it will not be used for many years, if at all.³⁹

The constitutional protection against confiscation does not depend on the source of the money used to purchase the property. It is enough that it is used to render the service. Property paid for out of moneys received for service belongs to the company, just as does that purchased out of proceeds of its bonds and stock.⁴⁰ Thus the fact that property was bought with excessive prior depreciation allowances does not prevent rates from being confiscatory at a later time, which fail to give a fair return on that property.⁴¹

§ 346. Particular Items Included.

A sum of money to represent what the utility reasonably needs as working capital, or cash working capital, should be included in valuation.⁴² In calculating an allowance for working cash capital to cover delayed income receipts, the cost of the service is to be considered, not the total earned amounts at retail prices, which would include profit.⁴³

³⁷ *Denver Union Stock Yard Co. v. United States* (1938) 304 U. S. 470, 82 L. Ed. 1469, 58 S. Ct. 990.

³⁸ *Denver Union Stock Yard Co. v. United States* (1938) 304 U. S. 470, 82 L. Ed. 1469, 58 S. Ct. 990.

³⁹ *Los Angeles Gas & Electric Corp. v. Railroad Commission* (1933) 289 U. S. 287, 77 L. Ed. 1180, 53 S. Ct. 637.

⁴⁰ *Board of Public Utility Com'rs v. New York Telephone Co.* (1926) 271 U. S. 23, 70 L. Ed. 808, 46 S. Ct. 363.

⁴¹ *Board of Public Utility Com'rs v. New York Telephone Co.* (1926)

271 U. S. 23, 70 L. Ed. 808, 46 S. Ct. 363.

⁴² *McCardle v. Indianapolis Water Co.* (1926) 272 U. S. 400, 71 L. Ed. 316, 47 S. Ct. 144; *Los Angeles Gas & Electric Corp. v. Railroad Commission* (D. C. Cal., 1932), 58 F. (2d) 256, aff'd (1933) 289 U. S. 287, 77 L. Ed. 1180, 53 S. Ct. 637; *Board of Public Utility Com'rs v. Elizabethtown Water Co.* (C. C. A. 3d, 1930) 43 F. (2d) 478.

⁴³ *Los Angeles Gas & Electric Corp. v. Railroad Commission* (D. C. Cal., 1932) 58 F. (2d) 256, aff'd (1933) 289 U. S. 287, 77 L. Ed. 1180, 53 S. Ct. 637.

A very advantageous contract, by which a power company buys its power of another, thus dispensing with its own plant, is to be considered in ascertaining the proper basis for rates.⁴⁴ It is a thing of value, and differs from an ordinary contract for current supplies. It takes the place of a physical plant that would otherwise be necessary and would be valued as part of the physical items.⁴⁵ It is not in that class of provident economical contracts which it is the duty of the company to make whenever possible so as to furnish economical service to the public.⁴⁶ It may perhaps be open to question whether this matter of power contract and dismantled plant might not be treated as an unusual obsolescence and allowance made on that basis.⁴⁷

Patent rights must be included in the rate base.⁴⁸ It is confiscatory to value patent rights at the price paid for them, when experience has shown a much higher value, and much has been spent to put the inventions into operation.⁴⁹

Water rights, like franchises, are rights intangible in value. The value of water rights however, must be included in the base for rates of a water company. By foresight, initiative and ingenuity the company secured them and it is entitled to share the benefits of that valuable possession.⁵⁰ A declaration by a State Constitution that water appropriated for sale is appropriated to a public use must be taken according to its subject-matter. The use is not by the public at large, like that of the ocean for sailing, but by certain individuals for their private benefit respectively. The declaration therefore does not necessarily mean more than that a few within reach of the supply may demand it for a reasonable price. The title of the utility remains. The use, though it may be demanded, must be paid for. It is

⁴⁴ *Duluth St. R. Co. v. Railroad and Warehouse Commission* (D. C. D. Minn., 3d Div., 1924), 4 F. (2d) 543, aff'd (1927) 273 U. S. 625, 71 L. Ed. 807, 47 S. Ct. 489.

⁴⁵ *Duluth St. R. Co. v. Railroad and Warehouse Commission* (D. C. D. Minn., 3d Div., 1924) 4 F. (2d) 543, aff'd (1927) 273 U. S. 625, 71 L. Ed. 807, 47 S. Ct. 489.

⁴⁶ *Duluth St. R. Co. v. Railroad and Warehouse Commission* (D. C. D. Minn., 3d Div., 1924) 4 F. (2d) 543, aff'd (1927) 273 U. S. 625, 71 L. Ed. 807, 47 S. Ct. 489.

⁴⁷ *Duluth St. R. Co. v. Railroad and*

Warehouse Commission (D. C. D. Minn., 3d Div., 1924) 4 F. (2d) 543, aff'd (1927) 273 U. S. 625, 71 L. Ed. 807, 47 S. Ct. 489.

⁴⁸ *Pacific Gas & Electric Co. v. San Francisco* (1924) 265 U. S. 403, 68 L. Ed. 1075, 44 S. Ct. 537.

⁴⁹ *Pacific Gas & Electric Co. v. San Francisco* (1924) 265 U. S. 403, 68 L. Ed. 1075, 44 S. Ct. 537.

⁵⁰ *McCardle v. Indianapolis Water Co.* (1926) 272 U. S. 400, 71 L. Ed. 316, 47 S. Ct. 144; *San Joaquin & K. R. Canal & Irrigation Co. v. County of Stanislaus* (1914) 233 U. S. 454, 58 L. Ed. 1041, 34 S. Ct. 652.

unreasonable to suppose that the declaration meant to compel a gift, and that in dealing with "water appropriated for sale" it meant that there should be nothing to sell.⁵¹

§ 347. Particular Items Not Included.

Franchises are generally excluded from the rate base.⁵² The fact that franchises are taxed does not require that they be included in the rate base.⁵³

A lease of public property may not be included as such.⁵⁴ Where a railroad attempted to include a value above that indicated by the rent paid for a lease of public property, in the rate base, the excess was rejected on the theory that if the stipulated rental was less than the fair annual value of the property it should be presumed that the grant of the excess was to the public rather than to the private interest of the utility, and that to accede to the railroad's contention would be to capitalize the value of public property against the interest of the public.⁵⁵

No sum representing capitalization of losses sustained in the past, even though those losses were due to the charging of inadequate rates, may be included in the rate base.⁵⁶ Past losses cannot be used to enhance the value of the property or to support a claim that rates for the future are confiscatory.⁵⁷

⁵¹ San Joaquin & K. R. Canal & Irrigation Co. v. County of Stanislaus (1914) 233 U. S. 454, 58 L. Ed. 1041, 34 S. Ct. 652.

⁵² Clark's Ferry Bridge Co. v. Public Service Commission (1934) 291 U. S. 227, 78 L. Ed. 767, 54 S. Ct. 427; Georgia Railway & Power Co. v. Railroad Commission (1923) 262 U. S. 625, 67 L. Ed. 1144, 43 S. Ct. 680, see the lower court opinion, 278 F. (2d) 42; Galveston Electric Co. v. Galveston (1922) 258 U. S. 388, 66 L. Ed. 678, 42 S. Ct. 351. See Brandeis, J., dissenting in United Railways & Electric Co. v. West (1930) 280 U. S. 234, 74 L. Ed. 390, 50 S. Ct. 123. But see Willeox v. Consolidated Gas Co. (1909) 212 U. S. 19, 53 L. Ed. 382, 29 S. Ct. 192, contra.

⁵³ See Brandeis, J., dissenting in United Railways & Electric Co. v.

West (1930) 280 U. S. 234, 74 L. Ed. 390, 50 S. Ct. 123.

⁵⁴ Manufacturers R. Co. v. United States (1918) 246 U. S. 457, 62 L. Ed. 821, 38 S. Ct. 383.

⁵⁵ Manufacturers R. Co. v. United States (1918) 246 U. S. 457, 62 L. Ed. 831, 38 S. Ct. 383.

⁵⁶ Board of Public Utility Com'rs v. New York Telephone Co. (1926) 271 U. S. 23, 70 L. Ed. 808, 46 S. Ct. 363; Georgia Railway & Power Co. v. Railroad Commission (1923) 262 U. S. 625, 67 L. Ed. 1144, 43 S. Ct. 680; Galveston Electric Co. v. Galveston (1922) 258 U. S. 388, 66 L. Ed. 678, 42 S. Ct. 351.

⁵⁷ Board of Public Utility Com'rs v. New York Telephone Co. (1926) 271 U. S. 23, 70 L. Ed. 808, 46 S. Ct. 363.

When rates themselves are in dispute, earnings produced by rates do not afford a standard for decision. Past profits cannot be used to sustain confiscatory rates for the future.⁵⁸ Where the utility claims as fair value an amount which would make old rates, with which it was satisfied, confiscatory, this fact is of no force except as indicating that the company has not been over modest in proposing its totals.⁵⁹

§ 348. State Rate Cases: Property in More Than One State: Burden on Interstate Commerce.

In state rate cases property is properly included in the rate base which lies in another state.⁶⁰ This violates no constitutional rights of a utility under the commerce clause, because a state agency is entitled to include extra-state properties in the rate base for the purpose of giving proper credit to a utility for its investment and operating expenses in determining a rate for gas sold and delivered within the state.⁶¹ This applies where the utility's product, such as gas, was produced in another state.⁶² Only extra-state property used and useful in producing and delivering gas in the regulating state, or an allocated part of jointly used property, should be included.⁶³

A utility has no tenable objection to a state agency's method of treating a utility's properties as an integrated operating system for gas sold and delivered within the state, even though some of the properties lie outside the state.⁶⁴ The fact that the utility failed to object in the administrative proceedings to inclusion of value of extra state producing properties permits a fair inference that such inclusion was no burden on interstate commerce and did not operate to plain-

⁵⁸ Los Angeles Gas & Electric Corp. v. Railroad Commission (1933) 289 U. S. 287, 77 L. Ed. 1180, 53 S. Ct. 637.

⁵⁹ Los Angeles Gas & Electric Corp. v. Railroad Commission (D. C. Cal., 1932) 58 F. (2d) 256, aff'd (1933) 289 U. S. 287, 77 L. Ed. 1180, 53 S. Ct. 637.

⁶⁰ Lone Star Gas Co. v. Texas (1938) 304 U. S. 224, 82 L. Ed. 1304, 58 S. Ct. 883, rehearing denied 304 U. S. 590, 82 L. Ed. 1549, 58 S. Ct. 1051.

⁶¹ Lone Star Gas Co. v. Texas (1938) 304 U. S. 224, 82 L. Ed. 1304,

58 S. Ct. 883, rehearing denied 304 U. S. 590, 82 L. Ed. 1549, 58 S. Ct. 1051.

⁶² Lone Star Gas Co. v. Texas (1938) 304 U. S. 224, 82 L. Ed. 1304, 58 S. Ct. 883, rehearing denied 304 U. S. 590, 82 L. Ed. 1549, 58 S. Ct. 1051.

⁶³ See United Fuel Gas Co. v. Railroad Commission (1929) 278 U. S. 300, 73 L. Ed. 390, 49 S. Ct. 150.

⁶⁴ Lone Star Gas Co. v. Texas (1938) 304 U. S. 224, 82 L. Ed. 1304, 58 S. Ct. 883, rehearing denied 304 U. S. 590, 82 L. Ed. 1549, 58 S. Ct. 1051.

tiff's injury.⁶⁵ And, the fact that the extra state producing properties were more expensive than operations within the state also negatives a contention that inclusion of their value burdens interstate commerce or operates to the utility's injury.⁶⁶

§ 349. — Allocation and Apportionment.

The problem of apportionment of property lying partly within and partly without a state is a difficult one, and it is impossible to formulate a rule of general application.⁶⁷ Allocations of value to be sufficiently accurate for practical purposes must be arrived at by the exercise of sound judgment based on facts that fairly reflect the relation between value of the system as a whole, and value of the part within a state.⁶⁸

No question of allocation will be considered until there has been a proper ascertainment of the thing to be allocated. This usually means that questions of allocation must await valuation of the entire property in question.⁶⁹ The Supreme Court has indicated that the best practice is to avoid allocation questions by proving independently the values of separable component units.⁷⁰ Where a state agency fixes the value of a utility's properties on the basis of one integrated system for gas sold and delivered in the state, the correctness of the determination as confiscatory or not may be assailed by the utility on the same basis upon trial *de novo* with the right to introduce evidence as to its property and business as an integrated system, and to have the sufficiency of its evidence ascertained by the criteria which the agency had properly used in the same manner in reaching its conclusion as to the proper state rate.⁷¹ In such circumstances the utility is under no duty to offer proof of value of the properties

⁶⁵ Lone Star Gas Co. v. Texas (1938) 304 U. S. 224, 82 L. Ed. 1304, 58 S. Ct. 883, rehearing denied 304 U. S. 590, 82 L. Ed. 1549, 58 S. Ct. 1051.

⁶⁶ Lone Star Gas Co. v. Texas (1938) 304 U. S. 224, 82 L. Ed. 1304, 58 S. Ct. 883, rehearing denied 304 U. S. 590, 82 L. Ed. 1549, 58 S. Ct. 1051.

⁶⁷ Great Northern R. Co. v. Weeks (1936) 297 U. S. 135, 80 L. Ed. 532, 56 S. Ct. 426.

⁶⁸ Great Northern R. Co. v. Weeks (1936) 297 U. S. 135, 80 L. Ed. 532, 56 S. Ct. 426.

⁶⁹ Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio (1937) 301 U. S. 292, 81 L. Ed. 1093, 57 S. Ct. 724.

⁷⁰ Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio (1937) 301 U. S. 292, 81 L. Ed. 1093, 57 S. Ct. 724.

⁷¹ Lone Star Gas Co. v. Texas (1938) 304 U. S. 224, 82 L. Ed. 1304, 58 S. Ct. 883, rehearing denied 304 U. S. 590, 82 L. Ed. 1549, 58 S. Ct. 1051.

as properly segregated between those used in interstate and intrastate business.⁷²

The regulation of intrastate business in a case in which intrastate and interstate business is intermingled, requires allocation and separate valuation of the property actually employed in the intrastate business.⁷³ Where the property of a small terminal railroad is used partly for common carrier services and partly for intraplant movements in an industry, the costs of each traffic and the value of property used in each must be allocated, on a basis of volume of traffic rather than of revenue received from each.⁷⁴ Where a telephone company, whose local rates are fixed by a city, also owns and operates long-distance toll lines, and credits its local exchange with twenty-five per cent. of the revenue of long-distance tolls from calls originating in the city, for the use of the local plant in rendering the long-distance service, this, and not the sixty per cent. claimed by the city, is reasonably sufficient, where it is an amount greater than that allowed by independent toll lines in the state to any of eight independent local exchanges, greater than the amount paid by the company to any of three hundred independent exchanges with which it has like connections, and is the allowance customarily approved by state commissions throughout the country.⁷⁵

Allocation may sometimes have to be decided before the jurisdiction of the agency can be properly ascertained.⁷⁶ Thus, where the same equipment is used for interstate and intrastate traffic, a determination of the allocation of intrastate costs for the use of the equipment is essential before the jurisdiction of a state agency can be clearly defined.⁷⁷

The base for the rate for service in one town which is part of an interconnected system should consist of, (1) the distributing plant

⁷² Lone Star Gas Co. v. Texas (1938) 304 U. S. 224, 82 L. Ed. 1304, 58 S. Ct. 883, rehearing denied 304 U. S. 590, 82 L. Ed. 1549, 58 S. Ct. 1051.

⁷³ Houston v. Southwestern Bell Telephone Co. (1922) 259 U. S. 318, 66 L. Ed. 961, 42 S. Ct. 486; *The Minnesota Rate Cases (1913) 230 U. S. 352, 57 L. Ed. 1511, 33 S. Ct. 729. See Wabash Valley Electric Co. v. Young (1933) 287 U. S. 488, 77 L. Ed. 447, 53 S. Ct. 234.

⁷⁴ Manufacturers R. Co. v. United States (1918) 246 U. S. 457, 62 L. Ed. 831, 38 S. Ct. 383.

⁷⁵ Houston v. Southwestern Bell Telephone Co. (1922) 259 U. S. 318, 66 L. Ed. 961, 42 S. Ct. 486.

⁷⁶ Smith v. Illinois Bell Telephone Co. (1930) 282 U. S. 133, 75 L. Ed. 255, 51 S. Ct. 65.

⁷⁷ Smith v. Illinois Bell Telephone Co. (1930) 282 U. S. 133, 75 L. Ed. 255, 51 S. Ct. 65.

in that town, and (2) the proportionate part of the value of the system property fairly attributable to that town's service.⁷⁸

B. Valuation of the Rate Base; and General Aspects of Valuation

1. In General

§ 350. Valuation Not Matter of Formula.

Mindful of its distinctive function in the enforcement of constitutional rights, the Supreme Court has refused to be bound by any artificial rule or formula of valuation in rate cases which changed conditions might upset. There must be a reasonable judgment having its basis in a proper consideration of all relevant facts.⁷⁹ The validity of a rate prescribed to become effective on a particular date depends upon a proper valuation of the rate base as of that date and for a reasonable time following.⁸⁰ This is a corollary of the rule that the issue of confiscation must be determined as of a particular time.⁸¹

The accepted theory of valuation of the rate base requires that numerous factors be taken into account.⁸² These factors are the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed and the sum required to meet operating expenses. The theory permits the consideration of additional factors, but requires that the foregoing be considered, and that they be given such weight as may be just and right in each case. The ultimate test is that the company receive a fair return on the value of its used and useful property, tangible and intangible.⁸³

⁷⁸ *Wabash Valley Electric Co. v. Young* (1933) 287 U. S. 488, 77 L. Ed. 447, 53 S. Ct. 234.

⁷⁹ **Los Angeles Gas & Electric Corp. v. Railroad Commission* (1933) 289 U. S. 287, 77 L. Ed. 1180, 53 S. Ct. 637; **The Minnesota Rate Cases* (1913) 230 U. S. 352, 57 L. Ed. 1511, 33 S. Ct. 729.

⁸⁰ *McCardle v. Indianapolis Water Co.* (1926) 272 U. S. 400, 71 L. Ed. 316, 47 S. Ct. 144; *Willecox v. Consolidated Gas Co.* (1909) 212 U. S. 19, 53 L. Ed. 382, 29 S. Ct. 192; *Great*

Falls Gas Co. v. Public Service Commission (D. C. D. Mont., 1929) 34 F. (2d) 297; *Greencastle Water Works Co. v. Public Service Commission* (D. C. S. D. Ind., 1929) 31 F. (2d) 600.

⁸¹ See § 329.

⁸² *Georgia Railway & Power Co. v. Railroad Commission* (1923) 262 U. S. 625, 67 L. Ed. 1144, 43 S. Ct. 680.

⁸³ *Georgia Railway & Power Co. v. Railroad Commission* (1923) 262 U. S. 625, 67 L. Ed. 1144, 43 S. Ct. 680.

"We hold, however, that the basis of all calculations as to the reason-

§ 351. Valuation as a Judicial Question.

Valuation is both a judicial and administrative question. It is a judicial question respecting legal theories of valuation or the methods of proof used, that is the type of evidence considered in law to be relevant, material and competent, to prove value.

It has been consistently held that evidence of reproduction cost⁸⁴ and historical cost or purchase price⁸⁵ must be considered in determining value.⁸⁶

Value is the "fair market value,"⁸⁷ or "full and true value"⁸⁸ of the property in question. The principles governing the ascertainment of value for the purposes of taxation are the same as those which control in condemnation cases, confiscation cases, and generally in controversies involving the ascertainment of past compensation.⁸⁹ In general it is the amount that the owner would be entitled to receive as just compensation upon a taking of that property by the state or the United States in the exertion of the power of eminent domain.⁹⁰

ableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience." (Mr. Justice Harlan in *Smyth v. Ames* (1898) 169 U. S. 466, 546, 547, 42 L. Ed. 819, 18 S. Ct. 418.)

⁸⁴ See § 356.

⁸⁵ See § 355.

⁸⁶ See § 354.

⁸⁷ *St. Joseph Stock Yards Co. v. United States* (1936) 298 U. S. 38, 80 L. Ed. 1033, 56 S. Ct. 720.

But it must be remembered that such property is not intended primarily for sale in the market, *West v. Chesapeake & Potomac Telephone Co.* (1935) 295 U. S. 662, 79 L. Ed. 1640, 55 S. Ct. 894.

⁸⁸ *Great Northern R. Co. v. Weeks* (1936) 297 U. S. 135, 80 L. Ed. 532, 56 S. Ct. 426.

⁸⁹ *Great Northern R. Co. v. Weeks* (1936) 297 U. S. 135, 80 L. Ed. 532, 56 S. Ct. 426; *West v. Chesapeake & Potomac Telephone Co.* (1935) 295 U. S. 662, 79 L. Ed. 1640, 55 S. Ct. 894.

⁹⁰ *Great Northern R. Co. v. Weeks* (1936) 297 U. S. 135, 80 L. Ed. 532, 56 S. Ct. 426; *West v. Chesapeake & Potomac Telephone Co.* (1935) 295 U. S. 662, 79 L. Ed. 1640, 55 S. Ct. 894.

Where in a finding of value of utility property an upward price trend in commodity values is not considered by the district court on the issue of confiscation, a new trial *de novo* must be had as that factor may affect income as well as values, although it does not require a finding of confiscation.⁹¹

A method of valuation whereby a commission divided gas properties into three groups, (a) gathering system, (b) transmission system, (c) distribution system was held not to be an erroneous method of valuation.⁹²

When correct legal methods of proof of value have been employed an administrative finding as to the fact of value will be upheld where clearly supported by adequate evidence, even where confiscation is claimed.⁹³

§ 352. — Land.

The value of land is the value for all its available uses and purposes, which would include any element of value that it might have by reason of special adaptation to particular uses.⁹⁴ A utility is not, however, entitled to an increase over that fair market value by virtue of the public use, for such would be to capitalize the franchise.⁹⁵ For instance no "special value of location" can be allowed because a bridge is located at the most favorable site on the river and construction at any other point would be more expensive, where the right to operate a toll-bridge anywhere is a gift by franchise, and all traffic comes from a road system built by the state.⁹⁶

⁹¹ *McCart v. Indianapolis Water Co.* (1938) 302 U. S. 419, 82 L. Ed. 336, 58 S. Ct. 324.

⁹² *United Gas Public Service Co. v. Texas* (1938) 303 U. S. 123, 82 L. Ed. 702, 58 S. Ct. 483, rehearing denied 303 U. S. 667, 82 L. Ed. 1124, 58 S. Ct. —.

⁹³ *United Gas Public Service Co. v. Texas* (1938) 303 U. S. 123, 82 L. Ed. 702, 58 S. Ct. 483, rehearing denied 303 U. S. 667, 82 L. Ed. 1124, 58 S. Ct. —; *West v. Chesapeake & Potomac Telephone Co.* (1935) 295 U. S. 662, 79 L. Ed. 1640, 55 S. Ct. 894.

⁹⁴ *St. Joseph Stock Yards Co. v. United States* (1936) 298 U. S. 38,

80 L. Ed. 1033, 56 S. Ct. 720; *Clark's Ferry Bridge Co. v. Public Service Commission* (1934) 291 U. S. 227, 78 L. Ed. 767, 54 S. Ct. 427; * *The Minnesota Rate Cases* (1913) 230 U. S. 352, 57 L. Ed. 1511, 33 S. Ct. 729.

⁹⁵ *St. Joseph Stock Yards Co. v. United States* (1936) 298 U. S. 38, 80 L. Ed. 1033, 56 S. Ct. 720; *Clark's Ferry Bridge Co. v. Public Service Commission* (1934) 291 U. S. 227, 78 L. Ed. 767, 54 S. Ct. 427.

⁹⁶ *Clark's Ferry Bridge Co. v. Public Service Commission* (1934) 291 U. S. 227, 78 L. Ed. 767, 54 S. Ct. 427.

§ 353. Valuation as an Administrative Question.

Where no confiscation is alleged, and legal theories of valuation are not involved, the doctrine of administrative finality, including its prime element, the substantial evidence rule, will be applied to administrative findings as to the fact of value.⁹⁷

Values of land, labor, buildings, equipment and other tangible or intangible objects cannot be fixed by an expanded concept of judicial notice, but must be proved by evidence which supports the conclusion reached.⁹⁸

Book value of gas lands has been taken at an assumed value named by the company where the evidence presented would not support a higher figure claimed by the company.⁹⁹ In arriving at this conclusion there is a presumption of the correctness of the company's books and the good faith of its managers.¹

2. Factors Considered in Valuation of the Rate Base**a. COST OF FACILITIES****§ 354. Evidence of Both Historical and Reproduction Cost to Be Considered.**

In valuing properties administrative agencies must, as a matter of legal theory, appropriately consider evidence of both historical cost, sometimes referred to as "original," or "initial" cost, or the purchase price,² and reproduction cost.³

⁹⁷ *Elmhurst Cemetery Co. of Joliet v. Commissioner of Internal Revenue* (1937) 300 U. S. 37, 81 L. Ed. 491, 57 S. Ct. 324.

⁹⁸ *Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio* (1937) 301 U. S. 292, 81 L. Ed. 1093, 57 S. Ct. 724; *West v. Chesapeake & Potomac Telephone Co.* (1935) 295 U. S. 662, 79 L. Ed. 1640, 55 S. Ct. 894.

⁹⁹ *United Fuel Gas Co. v. Railroad Commission* (1929) 278 U. S. 300, 73 L. Ed. 390, 49 S. Ct. 150.

¹ See § 757.

² *West v. Chesapeake & Potomac Telephone Co.* (1935) 295 U. S. 662, 79 L. Ed. 1640, 55 S. Ct. 894; *Smith v. Illinois Bell Telephone Co.* (1930) 282 U. S. 133, 75 L. Ed. 255, 51 S.

Ct. 65; *Greencastle Water Works Co. v. Public Service Commission* (D. C. S. D. Ind., 1929) 31 F. (2d) 600. See *McCardle v. Indianapolis Water Co.* (1926) 272 U. S. 400, 71 L. Ed. 316, 47 S. Ct. 144.

³ *Driscoll v. Edison Light & Power Co.* (1939) 307 U. S. 104, 83 L. Ed. 1134, 59 S. Ct. 715; *Railroad Commission of California v. Pacific Gas & Electric Co.* (1938) 302 U. S. 388, 82 L. Ed. 319, 58 S. Ct. 334; *West v. Chesapeake & Potomac Telephone Co.* (1935) 295 U. S. 662, 79 L. Ed. 1640, 55 S. Ct. 894; *Los Angeles Gas & Electric Corp. v. Railroad Commission* (1933) 289 U. S. 287, 77 L. Ed. 1180, 53 S. Ct. 637; *Smith v. Illinois Bell Telephone Co.* (1930) 282 U. S. 133,

Consideration of original cost alone will not do. The making of a just return for the use of the property involves the recognition of its fair present value. It is the property, and not its original cost, of which the owner may not be deprived.⁴ It is improper to fix value by subtracting the depreciation reserve from the book cost, and adding to the difference an allowance for working capital. Such a rough and ready approximation of value is arbitrary, for it is unsupported by findings based upon evidence.⁵ Where the present value of the property is in excess of historical cost, the utility is not limited to a return on cost. Conversely, if the plant has depreciated in value, the public should not be bound to allow a return measured by investment. Historical cost, reproduction cost, and all other factors affecting present value are to be considered and given their proper weight.⁶ The weight to be given to actual cost, to historical cost, and to cost of reproduction new, is to be determined in the light of the facts of the particular case.⁷

However, while the agency must consider evidence of both kinds of cost, it is not precluded from rejecting evidence of genuinely doubtful value of either reproduction cost,⁸ or historical cost,⁹ and making its determination of value on the basis of the evidence in the

75 L. Ed. 255, 51 S. Ct. 65; *McCardle v. Indianapolis Water Co.* (1926) 272 U. S. 400, 71 L. Ed. 316, 47 S. Ct. 144; *Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission* (1923) 262 U. S. 276, 67 L. Ed. 981, 43 S. Ct. 544; *Bluefield Waterworks & Improvement Co. v. Public Service Commission* (1923) 262 U. S. 679, 67 L. Ed. 1176, 43 S. Ct. 675; *Georgia Railway & Power Co. v. Railroad Commission* (1923) 262 U. S. 625, 67 L. Ed. 1144, 43 S. Ct. 680. See however, *Frankfurter, J.*, concurring in *Driscoll v. Edison Light & Power Co.* (1939) 307 U. S. 104, 83 L. Ed. 1134, 59 S. Ct. 715; and *Black, J.*, dissenting in *McCart v. Indianapolis Water Co.* (1938) 302 U. S. 419, 82 L. Ed. 336, 58 S. Ct. 324.

⁴ *Bluefield Waterworks & Improvement Co. v. Public Service Commission* (1923) 262 U. S. 679, 67 L. Ed. 1176, 43 S. Ct. 675; * *The Minnesota Rate Cases* (1913) 230 U. S. 352, 57

L. Ed. 1511, 33 S. Ct. 729; *Beaver Valley Water Co. v. Driscoll* (D. C. W. D. Pa., 1938) 23 F. Supp. 795.

⁵ *West v. Chesapeake & Potomac Telephone Co.* (1935) 295 U. S. 662, 79 L. Ed. 1640, 55 S. Ct. 894.

⁶ *West v. Chesapeake & Potomac Telephone Co.* (1935) 295 U. S. 662, 79 L. Ed. 1640, 55 S. Ct. 894.

⁷ *Los Angeles Gas & Electric Corp. v. Railroad Commission* (1933) 289 U. S. 287, 77 L. Ed. 1180, 53 S. Ct. 637.

⁸ *Railroad Commission of California v. Pacific Gas & Electric Co.* (1938) 302 U. S. 388, 82 L. Ed. 319, 58 S. Ct. 334; *Los Angeles Gas & Electric Corp. v. Railroad Commission* (D. C. Cal., 1932) 58 F. (2d) 256, aff'd 289 U. S. 287, 77 L. Ed. 1180, 53 S. Ct. 637.

⁹ But where the company's books show it accurately, it must be considered, *West v. Chesapeake & Potomac Telephone Co.* (1935) 295 U. S. 662, 79 L. Ed. 1640, 55 S. Ct. 894.

case which is of legally probative value, even though such evidence is evidence of historical cost only.¹⁰

Where an agency fixes value on a principle known only to itself, substituting that sort of calculation for such factors as historical cost and cost of reproduction, its determination is invalid.¹¹

§ 355. Historical Cost.

Historical, or reasonable actual cost of an efficient public utilities system measures fairly well the amount to be attributed to the physical elements of the property so long as there is no change in the level of applicable prices.¹² Historical cost is also referred to as "original" cost.¹³ Sometimes the same factor is considered under the label "capitalization."¹⁴

Thus the actual cost of the property—the investment the owners have made—is a relevant fact. But while it must be considered, it is not an exclusive or final test; the public has not underwritten the investment. Altered conditions may make the value more or less than cost. Even when cost is revised to reflect what may be deemed to have been invested prudently and in good faith, the investment may include property no longer used and useful for the public.¹⁵

Historical cost, to constitute such a measure of value, must be reasonable.¹⁶ Elements other than original cost should be considered

¹⁰ *Railroad Commission of California v. Pacific Gas & Electric Co.* (1938) 302 U. S. 388, 82 L. Ed. 319, 58 S. Ct. 334.

¹¹ *Railroad Commission of California v. Pacific Gas & Electric Co.* (1938) 302 U. S. 388, 82 L. Ed. 319, 58 S. Ct. 334; *West v. Chesapeake & Potomac Telephone Co.* (1935) 295 U. S. 662, 79 L. Ed. 1640, 55 S. Ct. 894. See also § 314 et seq.

¹² *Railroad Commission of California v. Pacific Gas & Electric Co.* (1938) 302 U. S. 388, 82 L. Ed. 319, 58 S. Ct. 334; *Clark's Ferry Bridge Co. v. Public Service Commission* (1934) 291 U. S. 227, 78 L. Ed. 767, 54 S. Ct. 427; *Los Angeles Gas & Electric Corp. v. Railroad Commission* (1933) 289 U. S. 287, 77 L. Ed. 1180, 53 S. Ct. 637; *McCardle v. Indianapolis Water Co.* (1926) 272 U. S. 400, 71 L. Ed. 316, 47 S. Ct. 144.

¹³ *Clark's Ferry Bridge Co. v. Public Service Commission* (1934) 291 U. S. 227, 78 L. Ed. 767, 54 S. Ct. 427.

¹⁴ *Knoxville v. Knoxville Water Co.* (1909) 212 U. S. 1, 53 L. Ed. 371, 29 S. Ct. 148.

¹⁵ *Los Angeles Gas & Electric Corp. v. Railroad Commission* (1933) 289 U. S. 287, 77 L. Ed. 1180, 53 S. Ct. 637.

¹⁶ *Clark's Ferry Bridge Co. v. Public Service Commission* (1934) 291 U. S. 227, 78 L. Ed. 767, 54 S. Ct. 427; *Darnell v. Edwards* (1917) 244 U. S. 564, 61 L. Ed. 1317, 37 S. Ct. 701; *Knoxville v. Knoxville Water Co.* (1909) 212 U. S. 1, 53 L. Ed. 371, 29 S. Ct. 148; *San Diego Land & Town Co. v. National City* (1899) 174 U. S. 739, 43 L. Ed. 1154, 19 S. Ct. 804. See *The Minnesota Rate Cases* (1913) 230 U. S. 352, 57 L. Ed. 1511, 33 S. Ct. 729.

for the reason, among others, that the original cost may have been unreasonable.¹⁷ But convincing proof is necessary to sustain the contention that the original cost was less than reasonable cost at the time.¹⁸ The fact that the contractor sustained a loss is not such proof, where the loss was due to an unusual flood, there was evidence that otherwise there would have been a profit, and there was no evidence that, with reasonable care, the loss could not have been prevented.¹⁹ Where a contractor built a plant valued at \$125,000, was paid that sum in bonds plus \$200,000 in common stock, and had a large stock interest in the company originally, the factor of "capitalization" is of no importance in valuation of the plant.²⁰ The circumstance that a road may have been unwisely built, in a locality where there is not sufficient business to sustain it, may be taken into account.²¹ Thus though the actual original cost may have been incurred in good faith, for purposes of valuation the fact that the service the utility actually performs is not equal to what it is prepared to handle may be considered.²²

§ 356. Reproduction Cost.

Evidence of reproduction cost is legally competent proof of the value of property and as such must be considered as one element in valuation for rate-making purposes.²³ The determination of present value is not an end in itself. Its purpose is to afford ground as to prediction for the future. When a statute²⁴ directs that an agency "give due consideration to all the elements of value recognized by the law of the land for rate-making purposes" reproduction cost must be considered.²⁵ But while helpful, it is not indispensable. Reproduction value is not a matter of outlay, but of estimate.²⁶ Evidence of cost of reproduction is to be given little, if any, weight in

¹⁷ San Diego Land & Town Co. v. National City (1899) 174 U. S. 739, 43 L. Ed. 1154, 19 S. Ct. 804.

¹⁸ Clark's Ferry Bridge Co. v. Public Service Commission (1934) 291 U. S. 227, 78 L. Ed. 767, 54 S. Ct. 427.

¹⁹ Clark's Ferry Bridge Co. v. Public Service Commission (1934) 291 U. S. 227, 78 L. Ed. 767, 54 S. Ct. 427.

²⁰ Knoxville v. Knoxville Water Co. (1909) 212 U. S. 1, 53 L. Ed. 371, 29 S. Ct. 148.

²¹ Darnell v. Edwards (1917) 244 U. S. 564, 61 L. Ed. 1317, 37 S. Ct. 701.

²² Darnell v. Edwards (1917) 244 U. S. 564, 61 L. Ed. 1317, 37 S. Ct. 701. See the Minnesota Rate Cases (1913) 230 U. S. 352, 57 L. Ed. 1511, 33 S. Ct. 729.

²³ See § 354.

²⁴ E. g., The Interstate Commerce Act, § 15a, 49 USCA 15a(4).

²⁵ St. Louis & O'Fallon R. Co. v. United States (1929) 279 U. S. 461, 73 L. Ed. 798, 49 S. Ct. 384.

²⁶ Ohio Utilities Co. v. Public Utilities Commission (1925) 267 U. S. 359, 69 L. Ed. 656, 45 S. Ct. 259.

determining such value in the absence of evidence that a reasonably prudent man would purchase or undertake the construction of the properties at such a figure.²⁷

It is impossible to ascertain what will amount to a fair return upon properties devoted to public service without giving consideration to the cost of labor, supplies, etc., at the time the investigation is made. An honest and intelligent forecast of probable future values, made upon a view of all the relevant circumstances, is essential. If the highly important element of present costs is wholly disregarded, such a forecast becomes impossible.²⁸ Consequently, when cost of reproduction furnishes no dependable criterion of values in succeeding years, there is a fundamental objection to its acceptance as a basis for finding confiscation. Valuation of the rate base is not inherently defective because of rejection of estimates which the course of events has deprived of credit as trustworthy prophecies.²⁹ Thus in 1933 estimates of present value, based on average prices from 1926 to 1929 could be rejected as a basis for prediction. The country faced a serious decline in prices and was entering upon a period of such depression as to constitute "a new experience to the present generation." It was not the usual case of possible fluctuating conditions but of a changed economic level.³⁰ Reproduction cost cannot be radically higher than actual cost six years before, when price trends have been downward, and there is no proof that actual cost was abnormally low.³¹

Reproduction cost is usually shown either by (1) evidence of actual experience in the construction and development of the property in question or similar properties, or by (2) estimates of less concrete character. Of these two types of proof, evidence of actual experience, especially in a recent period, may be an important check upon extravagant estimates.³²

²⁷ *Atlanta, B. & C. R. Co. v. United States* (1935) 296 U. S. 33, 80 L. Ed. 25, 56 S. Ct. 12.

²⁸ *Los Angeles Gas & Electric Corp. v. Railroad Commission* (1933) 289 U. S. 287, 77 L. Ed. 1180, 53 S. Ct. 637.

²⁹ *Los Angeles Gas & Electric Corp. v. Railroad Commission* (1933) 289 U. S. 287, 77 L. Ed. 1180, 53 S. Ct. 637.

³⁰ *Los Angeles Gas & Electric Corp. v. Railroad Commission* (1933) 289

U. S. 287, 311, 77 L. Ed. 1180, 53 S. Ct. 637.

³¹ *Clark's Ferry Bridge Co. v. Public Service Commission* (1934) 291 U. S. 227, 78 L. Ed. 767, 54 S. Ct. 427.

³² *Railroad Commission of California v. Pacific Gas & Electric Co.* (1938) 302 U. S. 388, 82 L. Ed. 319, 58 S. Ct. 334; *Los Angeles Gas & Electric Corp. v. Railroad Commission* (1933) 289 U. S. 287, 77 L. Ed. 1180, 53 S. Ct. 637. See also §767 et seq.

Cost of reproduction does not furnish an exclusive test; it does not justify the acceptance of results which depend on mere conjecture. To declare legislative action unconstitutional, value, like other disputed facts, must be clearly proved.³³

Where units installed before 1914 are valued at unit prices of 1914, units installed from 1914 to 1919 are valued at 1914 prices plus an allowance for increased costs during the period, and units installed after 1919 are valued at recorded net costs of additions less retirements, there has been no consideration of reproduction costs.³⁴

§ 357. — Time as of Which Reproduction Cost Will Be Considered.

The reproduction cost which is to be considered in valuation by administrative agencies is the cost of reproduction at the time of the administrative inquiry.³⁵ However, the time element was held to have been properly handled where the agency found, in figures, reproduction cost for 1914, and then considered, as affecting reproduction cost, the rise in prices between 1914 and 1921, the year of the inquiry.³⁶ This is to be distinguished from the time as of which prescribed rates will be tested where confiscation is alleged, which is the date of the trial *de novo* in the reviewing court.³⁷

§ 358. — Particular Factors.

Reproduction cost should include a reasonable allowance for organization and other overhead charges that necessarily would be incurred in reproducing the utility.³⁸ An agency may disregard, however, remote and conjectural elements of reproduction cost which do not have a basis in substantial evidence, such as cost of financing,³⁹ and

³³ Los Angeles Gas & Electric Corp. v. Railroad Commission (1933) 289 U. S. 287, 77 L. Ed. 1180, 53 S. Ct. 637.

³⁴ St. Louis & O'Fallon R. Co. v. United States (1929) 279 U. S. 461, 73 L. Ed. 798, 49 S. Ct. 384.

³⁵ Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission (1923) 262 U. S. 276, 67 L. Ed. 981, 43 S. Ct. 544, 31 A. L. R. 807; Board of Public Utility Com'rs v. Elizabethtown Water Co. (C. C. A. 3d, 1930) 43 F. (2d) 478. See Georgia Railway & Power Co. v. Railroad Commission (1923) 262 U. S. 625, 67 L. Ed. 1144, 43 S. Ct. 680.

³⁶ Georgia Railway & Power Co. v. Railroad Commission (1923) 262 U. S. 625, 67 L. Ed. 1144, 43 S. Ct. 680.

³⁷ See § 262 et seq.

³⁸ Ohio Utilities Co. v. Public Utilities Commission (1925) 267 U. S. 359, 69 L. Ed. 656, 45 S. Ct. 259.

³⁹ Dayton Power & Light Co. v. Public Utilities Commission (1934) 292 U. S. 290, 78 L. Ed. 1267, 54 S. Ct. 647; Los Angeles Gas & Electric Corp. v. Railroad Commission (1933) 289 U. S. 287, 77 L. Ed. 1180, 53 S. Ct. 637.

promoters' remuneration.⁴⁰ An item for interest upon the construction cost may be included. This, however, should be calculated upon the amount of money invested from time to time as the work of construction progresses.⁴¹

Facilities no longer necessary may properly be excluded from an estimate of reproduction cost.⁴² Thus a gas generating plant, properly part of the historical cost because needed at the time, does not come into reproduction cost where the subsequent discovery of natural gas renders it unnecessary. In a new construction under present conditions such a plant would not be built.⁴³

Where a change in physical conditions has added to the probable cost of reproduction no sum may be included to account for the change.⁴⁴ Thus, where to reproduce a gas distributing plant originally installed in unpaved streets would entail the expense of breaking and repaving streets since paved, no sum may be included in the estimated reproduction cost to cover that expense.⁴⁵

§ 359. — Commodity Indices.

Any just valuation must take into account general changes in the level of prices.⁴⁶ But utility property is not intended for sale in the market, and hence it would be fundamental error to adjust value to sudden fluctuations in price level.⁴⁷ While, therefore, changes in price level must be considered with the other required factors, it is fundamental error to ignore legally sufficient evidence of historical cost and reproduction cost, and to substitute a system of trending the dollar value of the plant as found by a court in a previous case into

⁴⁰ Los Angeles Gas & Electric Corp. v. Railroad Commission (1933) 289 U. S. 287, 77 L. Ed. 1180, 53 S. Ct. 637.

⁴¹ Greencastle Water Works Co. v. Public Service Commission (D. C. S. D. Ind., 1929) 31 F. (2d) 600.

⁴² Los Angeles Gas & Electric Corp. v. Railroad Commission (1933) 289 U. S. 287, 77 L. Ed. 1180, 53 S. Ct. 637.

⁴³ Los Angeles Gas & Electric Corp. v. Railroad Commission (1933) 289 U. S. 287, 77 L. Ed. 1180, 53 S. Ct. 637.

⁴⁴ Des Moines Gas Co. v. Des Moines (1915) 238 U. S. 153, 59 L. Ed. 1244, 35 S. Ct. 811.

⁴⁵ Des Moines Gas Co. v. Des Moines (1915) 238 U. S. 153, 59 L. Ed. 1244, 35 S. Ct. 811; Board of Public Utility Com'rs v. Elizabethtown Water Co. (C. C. A. 3d, 1930) 43 F. (2d) 478.

⁴⁶ West v. Chesapeake & Potomac Telephone Co. (1935) 295 U. S. 662, 79 L. Ed. 1640, 55 S. Ct. 894. See Clark's Ferry Bridge Co. v. Public Service Commission (1934) 291 U. S. 227, 78 L. Ed. 767, 54 S. Ct. 427.

⁴⁷ West v. Chesapeake & Potomac Telephone Co. (1935) 295 U. S. 662, 79 L. Ed. 1640, 55 S. Ct. 894; Greencastle Water Works Co. v. Public Service Commission (D. C. S. D. Ind., 1929) 31 F. (2d) 600.

an equivalent of dollar value nine years later by the use of price trend indices as a "translator."⁴⁸ In such a case it is a denial of due process to make no appraisal of the physical plant or property by use of the required factors, but to determine value by taking the previous value, less the then depreciation reserve, the annual net additions to plant, the depreciation reserve as at previous valuation, and annual net additions thereto, and trend each figure to the later value by means of commodity price trend indices not prepared as an aid to the appraisal of property, giving results which vary widely, and weighted for averaging upon a principle not disclosed.⁴⁹ An even more fundamental defect is the use of such indices when they reflect sudden shifts in price level, and not general changes in the price level.⁵⁰

However, a price index may be used to obtain the present value of specific property, separated from other sorts of property so valued.⁵¹ For instance, this is the practice of the Interstate Commerce Commission in translating the value of specific railroad property, such as steel rails, by the use of the differential between the per ton price on the date of the original appraisal, and the price prevailing at a later date.⁵² But such use is quite distinct from the application of general commodity indices to a conglomerate of assets constituting a utility plant.⁵³

§ 360. Prices Paid to Affiliates.

Prices paid or agreed upon for properties between affiliated corporations who may not be dealing at arm's length may be a poor criterion of value, and are regarded with suspicion by the courts.⁵⁴ Evi-

⁴⁸ *West v. Chesapeake & Potomac Telephone Co.* (1935) 295 U. S. 662, 79 L. Ed. 1640, 55 S. Ct. 894.

⁴⁹ *West v. Chesapeake & Potomac Telephone Co.* (1935) 295 U. S. 662, 79 L. Ed. 1640, 55 S. Ct. 894.

⁵⁰ *West v. Chesapeake & Potomac Telephone Co.* (1935) 295 U. S. 662, 79 L. Ed. 1640, 55 S. Ct. 894.

⁵¹ *West v. Chesapeake & Potomac Telephone Co.* (1935) 295 U. S. 662, 79 L. Ed. 1640, 55 S. Ct. 894.

⁵² *West v. Chesapeake & Potomac Telephone Co.* (1935) 295 U. S. 662, 79 L. Ed. 1640, 55 S. Ct. 894.

⁵³ *West v. Chesapeake & Potomac Telephone Co.* (1935) 295 U. S. 662, 79 L. Ed. 1640, 55 S. Ct. 894.

⁵⁴ *American Telephone & Telegraph Co. v. United States* (1936) 299 U. S. 232, 81 L. Ed. 142, 57 S. Ct. 170; *Dayton Power & Light Co. v. Public Utilities Commission of Ohio* (1934) 292 U. S. 290, 78 L. Ed. 1267, 54 S. Ct. 647; *Columbus Gas & Fuel Co. v. Public Utilities Commission* (1934) 292 U. S. 398, 78 L. Ed. 1327, 54 S. Ct. 763.

dence of affiliations is relevant,⁵⁵ and when it has been established that agreements have been made between companies so affiliated, the burden of proof is on the company claiming confiscation to show that the prices paid were not too high.⁵⁶

b. GOING CONCERN VALUE

§ 361. Nature of Going Concern Value.

The value of property used in performing services is single in substance.⁵⁷ Yet though single in substance such value may be broken down into various elements. "Going concern," or "going" value is the element of value in an established plant doing business and earning money over one not thus advanced.⁵⁸ It is that addition to the value of the physical plant of the utility which accrues because the plant is in operation with customers acquired.⁵⁹ As an element of value it is a property right.⁶⁰

The concept of going value is not to be used to escape the just exercise of the regulatory power in fixing rates, and, on the other hand, that authority is not entitled to treat a living organism as nothing more than bare bones. The principle thus recognized and limited is obviously difficult of application. Attempts at a precise definition have been avoided.⁶¹

⁵⁵ *Smith v. Illinois Bell Telephone Co.* (1930) 282 U. S. 133, 75 L. Ed. 255, 51 S. Ct. 65.

⁵⁶ *Dayton Power & Light Co. v. Public Utilities Commission of Ohio* (1934) 292 U. S. 290, 78 L. Ed. 1267, 54 S. Ct. 647. See also § 761.

⁵⁷ *Denver Union Stock Yard Co. v. United States* (1938) 304 U. S. 470, 82 L. Ed. 1469, 58 S. Ct. 990.

⁵⁸ *Secretary of Agriculture.*

St. Joseph Stock Yards Co. v. United States (1936) 298 U. S. 38, 80 L. Ed. 1033, 56 S. Ct. 720.

State Agencies.

Los Angeles Gas & Electric Corp. v. Railroad Commission (1933) 289 U. S. 287, 77 L. Ed. 1180, 53 S. Ct. 637; **Des Moines Gas Co. v. Des Moines* (1915) 238 U. S. 153, 59 L. Ed. 1244, 35 S. Ct. 811; *McCardle v. Indianapolis Water Co.* (1926) 272 U. S. 400, 71 L. Ed. 316, 47 S. Ct. 144; *Denver v. Denver Union Water Co.* (1918)

246 U. S. 178, 62 L. Ed. 649, 38 S. Ct. 278; *International Ry. Co. v. Prendergast* (D. C. W. D. N. Y., 1932) 1 F. Supp. 623.

⁵⁹ *Dayton Power & Light Co. v. Public Utilities Commission of Ohio* (1934) 292 U. S. 290, 78 L. Ed. 1267, 54 S. Ct. 647; *Board of Public Utility Com'rs v. Elizabethtown Water Co.* (C. C. A. 3d, 1930) 43 F. (2d) 478; **International Ry. Co. v. Prendergast* (D. C. W. D. N. Y., 1932) 1 F. Supp. 623.

⁶⁰ *Los Angeles Gas & Electric Corp. v. Railroad Commission* (1933) 289 U. S. 287, 77 L. Ed. 1180, 53 S. Ct. 637; *International Ry. Co. v. Prendergast* (D. C. W. D. N. Y., 1932) 1 F. Supp. 623.

⁶¹ *Los Angeles Gas & Electric Corp. v. Railroad Commission* (1933) 289 U. S. 287, 77 L. Ed. 1180, 53 S. Ct. 637.

Going value cannot be used as an attempt to recoup past losses. Deficits in the past do not afford a legal basis for invalidating rates, otherwise compensatory, any more than past profits can be used to sustain confiscatory rates for the future.⁶²

Going value is not to be confused with good will, which is not to be considered in determining whether rates fixed for public service corporations are confiscatory. Good will is defined as that element of value which inheres in the fixed and favorable consideration of customers, arising from an established and well-known and well-conducted business.⁶³

§ 362. Going Concern Value Must Be Considered.

Going concern value must be considered as one factor in valuation of a rate base.⁶⁴ But it is not something to be read into every balance sheet as a perfunctory addition.⁶⁵ And questions of going concern value cannot be disposed of adequately until the value of the physical plant has first been ascertained.⁶⁶

§ 363. Separate Allowance for Going Concern Value Not Always Necessary.

A separate allowance for going concern value need not be made where the agency gives it reasonable weight with the physical factors in order to determine fair value of the property as a whole.⁶⁷ Thus

⁶² Los Angeles Gas & Electric Corp. v. Railroad Commission (1933) 289 U. S. 287, 77 L. Ed. 1180, 53 S. Ct. 637.
⁶³ State Agencies.

Los Angeles Gas & Electric Corp. v. Railroad Commission (1933) 289 U. S. 287, 77 L. Ed. 1180, 53 S. Ct. 637; Galveston Electric Co. v. Galveston (1922) 258 U. S. 388, 66 L. Ed. 678, 42 S. Ct. 351; Des Moines Gas Co. v. Des Moines (1915) 238 U. S. 153, 59 L. Ed. 1244, 35 S. Ct. 811; Willeox v. Consolidated Gas Co. (1909) 212 U. S. 19, 53 L. Ed. 382, 29 S. Ct. 192.

⁶⁴ State Agencies.

Los Angeles Gas & Electric Corp. v. Railroad Commission (1933) 289 U. S. 287, 77 L. Ed. 1180, 53 S. Ct. 637; Houston v. Southwestern Bell Telephone Co. (1922) 259 U. S. 318, 66 L. Ed. 961, 42 S. Ct. 486; Knoxville v. Knoxville Water Co. (1909)

212 U. S. 1, 53 L. Ed. 71, 29 S. Ct. 148; Board of Public Utility Com'rs v. Elizabethtown Water Co. (C. C. A. 3d, 1930) 43 F. (2d) 478.

Interstate Commerce Commission.

See Stone, J., dissenting in United States v. Chicago, M., St. P. & P. R. Co. (1931) 282 U. S. 311, 75 L. Ed. 359, 51 S. Ct. 159.

⁶⁵ Dayton Power & Light Co. v. Public Utilities Commission of Ohio (1934) 292 U. S. 290, 78 L. Ed. 1267, 54 S. Ct. 647.

⁶⁶ Ohio Bell Telephone Co. v. Public Utilities Commission (1937) 301 U. S. 292, 81 L. Ed. 1093, 57 S. Ct. 724.

⁶⁷ Driscoll v. Edison Light & Power Co. (1938) 307 U. S. 104, 83 L. Ed. 1134, 59 S. Ct. 715; Denver Union Stock Yard Co. v. United States (1938) 304 U. S. 470, 82 L. Ed. 1469, 58 S. Ct. 990.

no separate allowance for going concern value need be made where the factors which constitute going concern value have been considered and allowed for under another head, such as "overhead charges,"⁶⁸ or where the fact that the plant is in successful operation is expressly taken into account and a value fixed which considerably exceeds its cost, for instance a value including overheads at fifteen per cent. in addition to organization expenses.⁶⁹ Fixing fair value, in an appropriate case, several hundred thousand dollars above the agency's average of original and reproduction cost, both depreciated, gives practical effect to weighing and consideration of going concern value. Where the rate base does not underestimate value as of the period to which rates are applicable, an excess amount, for instance \$5,500,000 in a rate base of \$65,500,000 can appropriately be assigned to elements of value which may not have been fully covered, such as going value. The fact that this margin in the rate base was not described as going value is unimportant, if the rate base was in fact large enough to embrace that element.⁷⁰ Under these principles no separate figure for going concern value need be added, despite the fact that the amount of property investment is small and the value of the utility property lies in the sales made there rather than in the investment of property, the fact that the utility made large gifts of money and land to its customers, and the fact that one of its services was superior to that of other utilities, because none of these considerations has much, if any, bearing on the ascertainment of going value. They do not show superior service and earning power at reasonable rates and fall far short of condemning as arbitrary and confiscatory the agency's refusal to add a separate figure to the value of the physical assets.⁷¹

A rate is not confiscatory where there is a questionable treatment of going value, when there are adequate compensatory errors in favor of the complainant.⁷² But where a master expressly reports that his valuation of the physical property and water rights includes no increment because the property constitutes an assembled and established

⁶⁸ *Des Moines Gas Co. v. Des Moines* (1915) 238 U. S. 153, 59 L. Ed. 1244, 35 S. Ct. 811.

⁶⁹ *Los Angeles Gas & Electric Corp. v. Railroad Commission* (1933) 289 U. S. 287, 77 L. Ed. 1180, 53 S. Ct. 637.

⁷⁰ *Los Angeles Gas & Electric Corp. v. Railroad Commission* (1933) 289

U. S. 287, 77 L. Ed. 1180, 53 S. Ct. 637.

⁷¹ *Denver Union Stock Yard Co. v. United States* (1938) 304 U. S. 470, 82 L. Ed. 1469, 58 S. Ct. 990.

⁷² *Los Angeles Gas & Electric Corp. v. Railroad Commission* (1933) 289 U. S. 287, 77 L. Ed. 1180, 53 S. Ct. 637.

plant doing business and earning money, and an examination of his report convinces the court that this is true, the return allowed is clearly confiscatory.⁷³

To require appraisal of going concern value separately the utility must present evidence that the agency failed to give reasonable weight to such value,⁷⁴ or furnish convincing proof that its property is being confiscated because of the absence of a separate allowance for going concern value.⁷⁵

§ 364. Factors Which Indicate Going Concern Value.

Going concern value depends primarily upon the circumstances of each case, largely upon the facts of the company's history, the length of its existence, and the strength of its organization.⁷⁶ It depends upon use and is measured, or at least significantly indicated, by the profitability of present and prospective service rendered at rates that are just and reasonable as between the owner of and those served by the property.⁷⁷ It may be less than, equal to, or more than, present cost of plant less depreciation plus necessary supplies and working capital.⁷⁸ A proper method of analysis is to consider what capital expenditures would be required to transfer the utility, reproduced and ready to begin operations, into the utility actually operating at its present normal rate.⁷⁹ The factors of going value are the sums necessary to acquire patronage, trained personnel, records, and schedules of operation, and those representing maintenance, depreciation, taxes and interest on the property reproduced between the time it is ready to operate and the time it reaches normal operation.⁸⁰

⁷³ Los Angeles Gas & Electric Corp. v. Railroad Commission (1933) 289 U. S. 287, 77 L. Ed. 1180, 53 S. Ct. 637.

⁷⁴ Driscoll v. Edison Light & Power Co. (1939) 307 U. S. 104, 83 L. Ed. 1134, 59 S. Ct. 715.

⁷⁵ St. Joseph Stock Yards Co. v. United States (1936) 298 U. S. 38, 80 L. Ed. 1033, 56 S. Ct. 720.

⁷⁶ Los Angeles Gas & Electric Corp. v. Railroad Commission (1933) 289 U. S. 287, 77 L. Ed. 1180, 53 S. Ct. 637; McCordle v. Indianapolis Water Co. (1926) 272 U. S. 400, 71 L. Ed. 316, 47 S. Ct. 144; Des Moines Gas Co. v. Des Moines (1915) 238 U. S. 153, 59

L. Ed. 1244, 35 S. Ct. 811. See Denver v. Denver Union Water Co. (1918) 246 U. S. 178, 62 L. Ed. 649, 38 S. Ct. 278.

⁷⁷ Denver Union Stock Yard Co. v. United States (1938) 304 U. S. 470, 82 L. Ed. 1469, 58 S. Ct. 990.

⁷⁸ Denver Union Stock Yard Co. v. United States (1938) 304 U. S. 470, 82 L. Ed. 1469, 58 S. Ct. 990.

⁷⁹ International Ry. Co. v. Prendergast (D. C. W. D. N. Y., 1932) 1 F. Supp. 623.

⁸⁰ International Ry. Co. v. Prendergast (D. C. W. D. N. Y., 1932) 1 F. Supp. 623.

Going value is measurable by a percentage of the value of the physical plant to be added to that value.⁸¹ Thus, it has been said that evidence indicated that going value of ten per cent. of the value of the physical plant would not be too high.⁸² However, there is no necessary relation between the value of physical properties and going value, so that the percentage allowed in the one case may be no guide to the proper percentage in another.⁸³

Reorganization costs have been considered proper factors in determining going value,⁸⁴ and going value may depend on the expenditure, in the past, of moneys from sources other than the utility's treasury.⁸⁵

Going concern value is itself an estimate, and may be based on estimates as to the cost of attaching new customers to the business,⁸⁶ and even as to the loss of income on capital used during the period of reproduction, although some estimates of such loss have been rejected as of too little probative force.⁸⁷ Estimates as to going value may be rejected if not based upon a knowledge of the history and circumstances of the enterprise.⁸⁸

Where no evidence is introduced to show that financing costs have been or will be incurred there is no need to include an allowance for it in valuation, either separately or as a factor in going value.⁸⁹

Going value must not be ascertained by a formula of capitalizing alleged past deficits, or expenditures allowed as operating expenses.⁹⁰

§ 365. — Estimates Which Are Too Conjectural.

Where estimates of going value are obviously too conjectural, it is unnecessary to analyze them as they cannot be a sufficient basis for a

⁸¹ *McCardle v. Indianapolis Water Co.* (1926) 272 U. S. 400, 71 L. Ed. 316, 47 S. Ct. 144.

⁸² *McCardle v. Indianapolis Water Co.* (1926) 272 U. S. 400, 71 L. Ed. 316, 47 S. Ct. 144.

⁸³ *International Ry. Co. v. Prendergast* (D. C. W. D. N. Y., 1932) 1 F. Supp. 623.

⁸⁴ *United States v. Chicago, M., St. P. & P. R. Co.* (1931) 282 U. S. 331, 73 L. Ed. 359, 51 S. Ct. 159.

⁸⁵ See *Stone, J.*, dissenting in *United States v. Chicago, M., St. P. & P. R. Co.* (1931) 282 U. S. 311, 75 L. Ed. 359, 51 S. Ct. 159.

⁸⁶ *Columbus Gas & Fuel Co. v. Public Utilities Commission of Ohio*

(1934) 292 U. S. 398, 78 L. Ed. 1327, 54 S. Ct. 763.

⁸⁷ *Columbus Gas & Fuel Co. v. Public Utilities Commission of Ohio* (1934) 292 U. S. 398, 78 L. Ed. 1327, 54 S. Ct. 763.

⁸⁸ *Columbus Gas & Fuel Co. v. Public Utilities Commission of Ohio* (1934) 292 U. S. 398, 78 L. Ed. 1327, 54 S. Ct. 763.

⁸⁹ See *Wabash Valley Electric Co. v. Young* (1933) 287 U. S. 488, 77 L. Ed. 447, 53 S. Ct. 234.

⁹⁰ *International Ry. Co. v. Prendergast* (D. C. W. D. N. Y., 1932) 1 F. Supp. 623.

finding of confiscation.⁹¹ Methods so rejected have included the "gross revenue" method, where the witness stated on the basis of his experience "that a purchaser will ordinarily and reasonably pay for a property with established earnings and on a stabilized operating basis approximately one year's gross revenue over and above the value of physical property."⁹² A second rejected method consisted in taking a percentage of the physical property, the witness stating that in his opinion a purchaser "would pay approximately 15 per cent. above the cost of reproduction because of the going value of a property so developed."⁹³ A third conjectural method was the "consumer method," where the going value of a gas company was based on a cost of not less than \$25 per meter.⁹⁴ A witness' testimony was too conjectural where, in addition to the foregoing methods, he said that he had also given consideration to the fact that the company had an exceptionally good history of growth, an established business, with a satisfactory record of earnings and excellent future prospects, and alluded to the growth of the municipal area served by the utility.⁹⁵ A method of computing the cost of securing business was too conjectural when it was based on an estimated cost of reproduction, where the percentage of construction completed each year was assumed for seven years, net earnings in those years were estimated, and the difference between eight per cent. interest upon the property estimated to be completed and these earnings was taken as the cost of securing business.⁹⁶ An estimate of going value made up by adding to the foregoing "cost of securing business" an item for cost "of organizing property and personnel" was rejected.⁹⁷

C. DEPRECIATION, DEPLETION, AND APPRECIATION

§ 366. Depreciation.

Depreciation for rate-making purposes is of two kinds, (1) depreciation of physical assets comprising the rate base in valuation of

⁹¹ Los Angeles Gas & Electric Corp. v. Railroad Commission (1933) 289 U. S. 287, 77 L. Ed. 1180, 53 S. Ct. 637.

⁹² Los Angeles Gas & Electric Corp. v. Railroad Commission (1933) 289 U. S. 287, 77 L. Ed. 1180, 53 S. Ct. 637.

⁹³ Los Angeles Gas & Electric Corp. v. Railroad Commission (1933) 289 U. S. 287, 77 L. Ed. 1180, 53 S. Ct. 637.

⁹⁴ Los Angeles Gas & Electric Corp. v. Railroad Commission (1933) 289 U. S. 287, 77 L. Ed. 1180, 53 S. Ct. 637.

⁹⁵ Los Angeles Gas & Electric Corp. v. Railroad Commission (1933) 289 U. S. 287, 77 L. Ed. 1180, 53 S. Ct. 637.

⁹⁶ Los Angeles Gas & Electric Corp. v. Railroad Commission (1933) 289 U. S. 287, 77 L. Ed. 1180, 53 S. Ct. 637.

⁹⁷ Los Angeles Gas & Electric Corp. v. Railroad Commission (1933) 289 U. S. 287, 77 L. Ed. 1180, 53 S. Ct. 637.

the rate base, and (2) an annual depreciation charge to be deducted from income, independently of valuation of the rate base.⁹⁸ Questions of depreciation in connection with valuation of the rate base cannot be disposed of adequately until the value of the physical plant in question has first been ascertained.⁹⁹ But in considering, for rate-base purposes, the value of the physical plant at any particular time, deduction must be made for accrued depreciation.¹ This factor of its reduction in value from what it was when the equipment was new, or newly bought, must be the subject of specific findings entering into the account of valuation of the physical assets of the rate base.² In this regard facts shown by reliable evidence are preferable to averages based on assumed probabilities. Thus it is objectionable to compute accrued depreciation by the "modified sinking fund method," which assumes that the loss of plant units by physical decay, obsolescence, and inadequacy can be forecast with substantial accuracy, in preference to ascertainment by the consideration of the definite testimony of competent experts, who examined the property subsequent to the alleged depreciation for the definite purpose of ascertaining existing facts, and made estimates from the conditions observed.³ When a plant has been conducted with unusual skill

⁹⁸ "Broadly speaking, depreciation is the loss, not restored by current maintenance, which is due to all the factors causing the ultimate retirement of the property. These factors embrace wear and tear, decay, inadequacy, and obsolescence. Annual depreciation is the loss which takes place in a year. In determining reasonable rates for supplying public service, it is proper to include in the operating expenses, that is, in the cost of producing the service, an allowance for consumption of capital in order to maintain the integrity of the investment in the service rendered. The amount necessary to be provided annually for this purpose is the subject of estimate and computation." (Mr. Chief Justice Hughes in *Lindheimer v. Illinois Bell Telephone Co.* (1934) 292 U. S. 151, 167, 78 L. Ed. 1182, 54 S. Ct. 658.)

See § 377 et seq.

⁹⁹ *Ohio Bell Telephone Co. v. Pub-*

lic Utilities Commission of Ohio (1937) 301 U. S. 292, 81 L. Ed. 1093, 57 S. Ct. 724.

¹ *Los Angeles Gas & Electric Corp. v. Railroad Commission* (1933) 289 U. S. 287, 77 L. Ed. 1180, 53 S. Ct. 637; *Smith v. Illinois Bell Telephone Co.* (1930) 282 U. S. 133, 75 L. Ed. 255, 51 S. Ct. 65; *Pacific Gas & Electric Co. v. San Francisco* (1924) 265 U. S. 403, 68 L. Ed. 1075, 44 S. Ct. 537; *The Minnesota Rate Cases* (1913) 230 U. S. 352, 57 L. Ed. 1511, 33 S. Ct. 729; *Knoxville v. Knoxville Water Co.* (1909) 212 U. S. 1, 53 L. Ed. 371, 29 S. Ct. 148.

² *Smith v. Illinois Bell Telephone Co.* (1930) 282 U. S. 133, 75 L. Ed. 255, 51 S. Ct. 65; *The Minnesota Rate Cases* (1913) 230 U. S. 352, 57 L. Ed. 1511, 33 S. Ct. 729.

³ *Pacific Gas & Electric Co. v. San Francisco* (1924) 265 U. S. 403, 68 L. Ed. 1075, 44 S. Ct. 537.

the owner may justly claim the consequent benefits.⁴ Where there is abandonment, not reasonably capable of anticipation, of property made obsolete by the introduction of patented inventions in order to lower the cost of production, a finding should, if possible, be made as to how much of the accrued depreciation is due to this cause, and how much is the result of physical causes.⁵ Installation of such inventions necessitates both new outlay of money and abandonment of property theretofore valuable to reduce cost of production. If the utility's permissible profits depend upon the lowered costs, and it is denied adequate return upon the property which made the reduction possible, as recompense for the obsolescence, it will suffer loss from this improvement in service. Where such invention and consequent obsolescence cannot have been long anticipated, so that it was not imperative, if possible, to provide for it out of previous revenues, the rate base must be fixed so as to avoid such loss. This may be done by proper valuation of the patent rights, or prompt allowance of recoupment for the obsolescence, or some other feasible method.⁶

A depreciation rate of three per cent. per annum has been held valid, by implication at least.⁷

§ 367. Depletion.

A factor related to depreciation is depletion, which occurs only where "wasting assets" utilities are regulated, of which the principal instance is that of a natural gas company. The assets of such utilities constantly decrease, being consumed without being replaced. In valuation of the rate base at any particular time depletion must be accounted for as its value is only the value of the assets remaining at that time.^{7a} The book value of lands held in reserve, to replace

⁴ Pacific Gas & Electric Co. v. San Francisco (1924) 265 U. S. 403, 68 L. Ed. 1075, 44 S. Ct. 537.

⁵ Pacific Gas & Electric Co. v. San Francisco (1924) 265 U. S. 403, 68 L. Ed. 1075, 44 S. Ct. 537.

⁶ Pacific Gas & Electric Co. v. San Francisco (1924) 265 U. S. 403, 68 L. Ed. 1075, 44 S. Ct. 537.

⁷ United Gas Public Service Co. v. Texas (1938) 303 U. S. 123, 82 L. Ed. 702, 58 S. Ct. 483, rehearing denied 303 U. S. 667, 82 L. Ed. 1124, 58 S. Ct. —.

^{7a} "To withhold from a public utility the privilege of including a depletion allowance among its operating expenses, while confining it to a return of 6½% upon the value of its wasting assets, is to take its property away from it without due process of law, at least where the waste is inevitable and rapid. The Commission has found that the life expectancy of the operated gas fields is only three years and two months. If that holding is correct, the owner of the exhausted fields will find itself in a brief time with

producing lands, the wasting assets of a natural gas company, may not be included in the rate base when the company has been enjoying an adequate depletion allowance.⁸ Often the only evidence available to ascertain this value is expert opinion as to the future yield of a company's property.⁹

§ 368. Appreciation.

Appreciation in the physical value of the property, due to aging and use, in the rare cases where it exists, may be taken into account by specific findings, as in the case of depreciation.¹⁰

V. GROSS INCOME

§ 369. In General.

Past income of a utility may ordinarily be ascertained without particular difficulty from an audit of the company's books. Probable future receipts of a utility can only be forecast. An administrative estimate of probable future receipts will be accepted where it is an honest and intelligent forecast in view of all the relevant circumstances, and not merely an unsupported prophecy.¹¹ Thus an order fixing tentative rates is not invalid when based on a prediction that the volume of business at those rates will produce adequate gross revenue, where the rates may be modified on application. There is no ground to assume the agency will reject an application to make such changes as experience shows to be necessary to produce the stipulated revenue.¹²

wells and leases that are worthless and with no opportunity in the interval to protect itself against the impending danger of exhaustion. Plainly the state must either surrender the power to limit the return or else concede to the business a compensating privilege to preserve its capital intact." (Mr. Justice Cardozo in *Columbus Gas & Fuel Co. v. Public Utilities Commission of Ohio* (1934) 292 U. S. 398, 404, 405, 78 L. Ed. 1327, 54 S. Ct. 763, 91 A. L. R. 1403.)

⁸ *Columbus Gas & Fuel Co. v. Public Utilities Commission of Ohio* (1934) 292 U. S. 398, 78 L. Ed. 1327, 54 S. Ct. 763, 91 A. L. R. 1403.

⁹ *Dayton Power & Light Co. v. Public Utilities Commission of Ohio* (1934) 292 U. S. 290, 78 L. Ed. 1267, 54 S. Ct. 647.

¹⁰ *The Minnesota Rate Cases* (1913) 230 U. S. 352, 57 L. Ed. 1511, 33 S. Ct. 729.

¹¹ *St. Joseph Stock Yards Co. v. United States* (1936) 298 U. S. 38, 80 L. Ed. 1033, 59 S. Ct. 720. See *Rowland v. Boyle* (1917) 244 U. S. 106, 61 L. Ed. 1022, 37 S. Ct. 577.

¹² *Clark's Ferry Bridge Co. v. Public Service Commission* (1934) 291 U. S. 227, 78 L. Ed. 767, 54 S. Ct. 427.

Income from by products of a public utility is ordinarily part of its income for rate-making purposes, even if the income accrues to a wholly owned subsidiary.¹³

In estimating revenue for a gas company, where temperatures affect consumption of gas, it is not unfair in fixing rates for a considerable period, to take average temperatures.¹⁴

VI. OPERATING CHARGES AND EXPENSES

§ 370. In General.

Once gross receipts or income are ascertained, operating charges or expenses are the factors which determine net income, which, related to valuation of the rate base, specifies the rate of return to the utility for use of its property.

A utility is not entitled to allowance of an item as an operating expense where there is no evidence of actual expenditures for the purpose, nor of studies of the cost of the item.¹⁵

Extravagant and wasteful costs of operation may be cut down to reasonable costs, for regulation cannot be frustrated by a requirement that the rate be made to compensate extravagant or unnecessary costs for any purpose. Expenditures are not within the province of managerial judgment where they are extravagant and wasteful, and are not allowable merely because they have been made.¹⁶ A business need not be loaded with a cost having no relation to actualities.¹⁷ On the other hand, the amounts of operating expenses are primarily to be determined in the exercise of business judgment by the corporation's directors,¹⁸ and unless the size clearly shows an abuse of discretion, or indicates bad faith, an agency is not empowered to substitute its judgment for that of the directors.¹⁹

¹³ *United Fuel Gas Co. v. Railroad Commission* (1929) 278 U. S. 300, 73 L. Ed. 390, 49 S. Ct. 150.

¹⁴ *Los Angeles Gas & Electric Corp. v. Railroad Commission* (1933) 289 U. S. 287, 77 L. Ed. 1180, 53 S. Ct. 637.

¹⁵ *Driscoll v. Edison Light & Power Co.* (1939) 307 U. S. 104, 83 L. Ed. 1134, 59 S. Ct. 715.

¹⁶ *Acker v. United States* (1936) 298 U. S. 426, 80 L. Ed. 1257, 56 S. Ct. 824.

¹⁷ *Acker v. United States* (1936) 298 U. S. 425, 80 L. Ed. 1257, 56 S. Ct. 824.

¹⁸ *Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission* (1923) 262 U. S. 276, 67 L. Ed. 981, 43 S. Ct. 544, 31 A. L. R. 807.

¹⁹ *Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission* (1923) 262 U. S. 276, 67 L. Ed. 981, 43 S. Ct. 544, 31 A. L. R. 807.

§ 371. Cost of Supplies or Facilities Purchased or Leased from Affiliate.

Where a utility leases or buys supplies from an affiliated company, a court should give close scrutiny to the companies' dealings to prevent imposition upon the community served.²⁰ Where a utility claims that rates are confiscatory, and the largest item of operating expense is the cost of gas purchased from an affiliate, a regulating agency is entitled to satisfactory evidence of reasonableness of costs,²¹ even if this involves an extensive valuation which would not be required in the case of parties dealing at arm's length in the general and open market.²² Where there is stock ownership giving unity of control, the utilities are not at arm's length. The agency is entitled to know whether advantage has been taken of the relation to put a burden on the purchaser.²³ And the mere fact that the charge is for interstate service, does not force a state agency to desist from all inquiry as to its fairness, at least where Congress has not acted and there is no federal agency regulating the interstate rates.²⁴ Recent decisions that the charge was reasonable in respect to sales at the gates of other cities, do not make a *prima facie* case in support of the charge as to a city not a party to those decisions. The reasonableness of the rate as to it was not in issue in the earlier cases.²⁵ Nor is there a *prima facie* case that the charge is reasonable because of undenied averments that no other supply is, or can be made, available at a lower rate, that the same rate is charged to other distributors by the supplying company, and by an independent company, and that the distributing company had tried to get a lower rate from its affiliate, but could not,²⁶ although such undenied averments might well constitute a *prima facie* case where the parties were independent of each other and dealing at arm's length.²⁷ But where there is

²⁰ *Houston v. Southwestern Bell Telephone Co.* (1922) 259 U. S. 318, 66 L. Ed. 961, 42 S. Ct. 486.

²¹ *Western Distributing Co. v. Public Service Commission* (1932) 285 U. S. 119, 76 L. Ed. 655, 52 S. Ct. 283.

²² *Western Distributing Co. v. Public Service Commission* (1932) 285 U. S. 119, 76 L. Ed. 655, 52 S. Ct. 283.

²³ *Western Distributing Co. v. Public Service Commission* (1932) 285 U. S. 119, 76 L. Ed. 655, 52 S. Ct. 283.

²⁴ *Western Distributing Co. v. Public Service Commission* (1932) 285 U. S. 119, 76 L. Ed. 655, 52 S. Ct. 283.

²⁵ *Western Distributing Co. v. Public Service Commission* (1932) 285 U. S. 119, 76 L. Ed. 655, 52 S. Ct. 283.

²⁶ *Western Distributing Co. v. Public Service Commission* (1932) 285 U. S. 119, 76 L. Ed. 655, 52 S. Ct. 283.

²⁷ *Western Distributing Co. v. Public Service Commission* (1932) 285 U. S. 119, 76 L. Ed. 655, 52 S. Ct. 283.

evidence that a local telephone company leases its instruments from a corporation which owns substantially all the stock of the local company, and which also owns a large majority of the stock of a third company from which the local company gets the greater part of its equipment and supplies, and there is evidence that the charges paid are reasonable and less than other sources would charge, the local company need not prove what the profits of the other two companies were, either generally or in the business done with it. Under the circumstances disclosed by the evidence, the fact of stock ownership is not important beyond requiring close scrutiny of the companies' dealings to prevent imposition upon the community served.²⁸

§ 372. Taxes.

Taxes are properly chargeable as operating expenses,²⁹ including both probable federal income tax on expected income,³⁰ and probable state income taxes.³¹ The amount allowable is the tax payable if a fair return should be earned, at the rate projected.³²

§ 373. Legal Expenses.

Legal expenses are proper operating charges, whether made in rate-making proceedings already held before an administrative agency,³³ or necessarily to be made in future administrative rate proceedings,³⁴ or upon judicial review.³⁵ Costs and expenses of periodic rate litigation should be amortized over a reasonable future period.³⁶

²⁸ *Houston v. Southwestern Bell Telephone Co.* (1922) 259 U. S. 318, 66 L. Ed. 961, 42 S. Ct. 486.

²⁹ *Willcox v. Consolidated Gas Co.* (1909) 212 U. S. 19, 53 L. Ed. 382, 29 S. Ct. 192.

³⁰ *Georgia Railway & Power Co. v. Railroad Commission* (1923) 262 U. S. 625, 67 L. Ed. 1144, 43 S. Ct. 680; *Galveston Electric Co. v. Galveston* (1922) 258 U. S. 388, 66 L. Ed. 678, 42 S. Ct. 351.

³¹ *Galveston Electric Co. v. Galveston* (1922) 258 U. S. 388, 66 L. Ed. 678, 42 S. Ct. 351.

³² *Galveston Electric Co. v. Galveston* (1922) 258 U. S. 388, 66 L. Ed. 678, 42 S. Ct. 351.

³³ *Driscoll v. Edison Light & Power Co.* (1939) 307 U. S. 104, 83 L. Ed. 1134, 59 S. Ct. 715; *West Ohio Gas Co. v. Public Utilities Commission of Ohio* (1935) 294 U. S. 63, 79 L. Ed. 761, 55 S. Ct. 316.

³⁴ *Denver Union Stock Yard Co. v. United States* (1938) 304 U. S. 470, 82 L. Ed. 1469, 58 S. Ct. 990.

³⁵ *West Ohio Gas Co. v. Public Utilities Commission of Ohio* (1935) 294 U. S. 63, 79 L. Ed. 761, 55 S. Ct. 316.

³⁶ E. g., ten years, *Driscoll v. Edison Light & Power Co.* (1939) 307 U. S. 104, 83 L. Ed. 1134, 59 S. Ct. 715. See *Denver Union Stock Yard Co. v. United States* (1938) 304 U. S. 470, 82 L. Ed. 1469, 58 S. Ct. 990.

Legal expenses may not be claimed upon judicial review, however, unless this claim is appropriately presented in the trial court.³⁷

§ 374. Dues, Donations and Subscriptions.

Dues, donations, and subscriptions are under complete control by the utility, and are so trivial that ordinarily a reviewing court will not undertake to decide whether the utility as of constitutional right is entitled to have any of them included in its future operating expenses.³⁸

§ 375. Repairs.

A reasonable amount for repairs may be included in the yearly operating charges. Where repairs have not been seasonably made, but deferred, no additional yearly sum to compensate for that failure may be included in the depreciation allowance.³⁹

§ 376. Advertising and Developmental Expense.

Advertising or developmental expenses to foster normal growth are legitimate charges upon income for rate purposes if confined within the limits of reason.⁴⁰

§ 377. Depreciation Allowance; in General.

Depreciation allowance for a particular period should be made for the reduction in value of a utility's property used and useful in rendering the service caused by use or obsolescence within that period,⁴¹ and is properly chargeable as an operating expense.⁴² It is proper to build up a depreciation reserve by an allowance in a given year greater than what is needed to pay for actual disbursements

³⁷ *Denver Union Stock Yard Co. v. United States* (1938) 304 U. S. 470, 82 L. Ed. 1469, 58 S. Ct. 990.

³⁸ *Denver Union Stock Yard Co. v. United States* (1938) 304 U. S. 470, 82 L. Ed. 1469, 58 S. Ct. 990.

³⁹ See § 377.

⁴⁰ *Denver Union Stock Yard Co. v. United States* (1938) 304 U. S. 470, 82 L. Ed. 1469, 58 S. Ct. 990; *West Ohio Gas Co. v. Public Utilities Commission of Ohio* (1935) 294 U. S. 63, 79 L. Ed. 761, 55 S. Ct. 316.

⁴¹ *United Railways & Electric Co. v. West* (1930) 280 U. S. 234, 74 L. Ed. 390, 50 S. Ct. 123; *Railroad Commission v. Cumberland Telephone & Telegraph Co.* (1909) 212 U. S. 414, 53 L. Ed. 577, 29 S. Ct. 357; *Knoxville v. Knoxville Water Co.* (1909) 212 U. S. 1, 53 L. Ed. 371, 29 S. Ct. 148.

⁴² *Lindheimer v. Illinois Bell Telephone Co.* (1934) 292 U. S. 151, 78 L. Ed. 1182, 54 S. Ct. 658; *Dayton Power & Light Co. v. Public Utilities Commission of Ohio* (1934) 292 U. S. 290, 78 L. Ed. 1267, 54 S. Ct. 647.

in that particular year,⁴³ but to raise more than money enough for the purpose and place the balance to the credit of capital on which to pay dividends cannot be proper treatment.⁴⁴

Differences are usually as to what property should be considered as having depreciated, but ordinarily the present value of the used and useful property, that is, the rate base for valuation purposes, is the proper basis for depreciation.⁴⁵ Thus upon what base the depreciation allowance should be computed presents a judicial question.⁴⁶

A depreciation allowance may not be increased to cover deferred maintenance cost because a utility has neglected to maintain its property or has failed to perform its duty to exact sufficient returns to maintain its investment unimpaired.⁴⁷

§ 378. — Amount.

The amount of depreciation allowance to be reserved out of annual income is a question of fact for the administrative agency.⁴⁸ The court is not required to prescribe an invariable method of computation, and will not overrule the agency's determination unless there is confiscation.⁴⁹ There is no confiscation where, considering the nature of the property, and upon facts shown by the evidence, the utility is allowed to reserve annually, and use for its own purposes an amount, which, according to common experience may be expected to produce a sum adequate to replace the property on the expiration

⁴³ *Railroad Commission v. Cumberland Telephone & Telegraph Co.* (1909) 212 U. S. 414, 53 L. Ed. 577, 29 S. Ct. 357.

⁴⁴ *Railroad Commission v. Cumberland Telephone & Telegraph Co.* (1909) 212 U. S. 414, 53 L. Ed. 577, 29 S. Ct. 357.

⁴⁵ *United Railways & Electric Co. v. West* (1930) 280 U. S. 234, 74 L. Ed. 390, 50 S. Ct. 123.

⁴⁶ *United Railways & Electric Co. v. West* (1930) 280 U. S. 234, 74 L. Ed. 390, 50 S. Ct. 123. See also § 344 et seq.

⁴⁷ *Galveston Electric Co. v. Galveston* (1922) 258 U. S. 388, 66 L. Ed. 678, 42 S. Ct. 351; *Knoxville v. Knoxville*

Water Co. (1909) 212 U. S. 1, 53 L. Ed. 371, 29 S. Ct. 148.

⁴⁸ *Secretary of Agriculture.*

St. Joseph Stock Yards Co. v. United States (1936) 298 U. S. 38, 80 L. Ed. 1033, 56 S. Ct. 720.

State Agencies.

Clark's Ferry Bridge Co. v. Public Service Commission (1934) 291 U. S. 227, 78 L. Ed. 767, 54 S. Ct. 427; *Smith v. Illinois Bell Telephone Co.* (1930) 282 U. S. 133, 75 L. Ed. 255, 51 S. Ct. 65; *Georgia Railway & Power Co. v. Railroad Commission* (1923) 262 U. S. 625, 67 L. Ed. 1144, 43 S. Ct. 680.

⁴⁹ *Clark's Ferry Bridge Co. v. Public Service Commission* (1934) 291 U. S. 277, 78 L. Ed. 767, 54 S. Ct. 427.

of its life.⁵⁰ A depreciation allowance is not excessive if it merely represents, in practice, the consumption of capital in the service rendered.⁵¹

§ 379. — — “Straight-Line” Method.

The “straight-line” method of computing amount of depreciation allowance reserves an amount each year which, without interest, will produce a fund sufficient to replace the structure, as presently valued, at the end of its life. It is often used for short-lived structures, or plants of such a character that they can be restored from time to time to the original condition of efficiency.⁵²

But the “straight-line” method is not so fair or equitable when applied to a long-lived structure, or one that is disintegrating gradually and continuously and not capable of being restored to its original condition.⁵³ However, where the life expectancy of a bridge is 45 to 50 years, an amount which, with simple interest at 4%, will produce the present value in 50 years, is not confiscatory. The utility is not entitled to reserve, by a “straight-line” method, an amount which, with no interest, will do this.⁵⁴

§ 380. — — Amount Need Not Be the Same as Accrued Depreciation.

Annual depreciation allowance according to good accounting practice, and accrued depreciation observed and estimated at a given time, need not be the same, and property represented by depreciation reserve cannot be used to support the imposition of a confiscatory rate. There is no rule which requires an allowance to be made or continued which in the light of experience is shown to be extravagant.⁵⁵ Estimates of depreciation may nevertheless be tested by the company’s experience respecting depreciation accrued in the past.⁵⁶

⁵⁰ Clark’s Ferry Bridge Co. v. Public Service Commission (1934) 291 U. S. 227, 78 L. Ed. 767, 54 S. Ct. 427.

⁵¹ Lindheimer v. Illinois Bell Telephone Co. (1934) 292 U. S. 151, 78 L. Ed. 1182, 54 S. Ct. 658.

⁵² Clark’s Ferry Bridge Co. v. Public Service Commission (1934) 291 U. S. 227, 78 L. Ed. 767, 54 S. Ct. 427.

⁵³ Clark’s Ferry Bridge Co. v. Public Service Commission (1934) 291 U. S. 227, 78 L. Ed. 767, 54 S. Ct. 427.

⁵⁴ Clark’s Ferry Bridge Co. v. Public Service Commission (1934) 291 U. S. 227, 78 L. Ed. 767, 54 S. Ct. 427.

⁵⁵ Clark’s Ferry Bridge Co. v. Public Service Commission (1934) 291 U. S. 227, 78 L. Ed. 767, 54 S. Ct. 427; Los Angeles Gas & Electric Corp. v. Railroad Commission (1933) 289 U. S. 287, 77 L. Ed. 1180, 53 S. Ct. 637.

⁵⁶ Columbus Gas & Fuel Co. v. Public Utilities Commission of Ohio (1934) 292 U. S. 398, 78 L. Ed. 1327, 54 S. Ct. 763, 91 A. L. R. 1403. See Stone, J., dissenting in United Railways & Electric Co. v. West (1930), 280 U. S. 234, 74 L. Ed. 390, 50 S. Ct. 123.

§ 381. — Unusual Obsolescence: Superseded Plant.

Where a power company made a very advantageous contract to buy its power of another company, which made it profitable to abandon its own plant, the contract was properly included in the rate base.⁵⁷ But the court also suggested, as an alternative, that the matter might have been treated as an unusual obsolescence, and allowance made on that basis.⁵⁸

§ 382. — Utility May Use Funds in Depreciation Reserve in Its Discretion.

The utility may use for its own purposes the amount reserved annually for depreciation allowance; and may not be required to apply the income received from the depreciation fund to make up any deficit of operation.⁵⁹ Where the utility charges excessive amounts to depreciation expense and so creates in the reserve account balances greater than required adequately to maintain the property, the property or money of the company represented by the credit balance in the reserve for depreciation cannot be used to overcome deficits in present or future earnings and to sustain rates otherwise confiscatory.⁶⁰

§ 383. — Depletion Allowance.

Public utility companies with wasting assets, such as a natural gas company, are entitled to an annual depletion allowance, to be reserved out of revenue, for the eventual replacement of their exhausted properties with new, producing properties.⁶¹ This depletion allowance is sometimes called "amortization."⁶² Failure to make a depletion allowance may result in confiscation.⁶³ But where an

⁵⁷ See § 344 et seq.

⁵⁸ *Duluth St. R. Co. v. Railroad & Warehouse Commission of Minnesota* (D. C. D. Minn., 3d Div., 1924) 4 F. (2d) 543, aff'd 273 U. S. 625, 71 L. Ed. 807, 47 S. Ct. 489.

⁵⁹ *Clark's Ferry Bridge Co. v. Public Service Commission* (1934) 291 U. S. 227, 78 L. Ed. 767, 54 S. Ct. 427.

⁶⁰ *Board of Public Utility Com'rs v. New York Telephone Co.* (1926) 271 U. S. 23, 70 L. Ed. 808, 46 S. Ct. 363.

⁶¹ *Columbus Gas & Fuel Co. v. Public Utilities Commission of Ohio* (1934) 292 U. S. 398, 78 L. Ed. 1327, 54 S. Ct. 763, 91 A. L. R. 1403.

⁶² *Dayton Power & Light Co. v. Public Utilities Commission of Ohio* (1934) 292 U. S. 290, 303, 78 L. Ed. 1267, 54 S. Ct. 647.

⁶³ *Columbus Gas & Fuel Co. v. Public Utilities Commission of Ohio* (1934) 292 U. S. 398, 78 L. Ed. 1327, 54 S. Ct. 763, 91 A. L. R. 1403.

adequate depletion allowance has been made, charges which are logically included, such as the rental of producing lands held in reserve, may not be made elsewhere.⁶⁴

§ 384. Joint Ownership.

Where a utility is jointly owned, but operated by one of the owners under an arrangement by which his ownership and possession shall cease at a particular time, it is error to charge to each year's expenses a proportionate part of said operating owner's investment.⁶⁵ Such payments are not proper rent charges, and bear no relation to the valuation of the property as property devoted to a public use.⁶⁶

VII. RATE OF RETURN

§ 385. In General.

As a prescribed fair rate of return, like the fact of value, may involve both method or theory of computation and simple finding of fact upon evidence, it may be both a judicial and an administrative question, that is, a mixed question of law and fact.⁶⁷ As a mixed question it is the court's duty upon trial *de novo* to determine the correct amount to the best of its ability in the exercise of a fair, enlightened and independent judgment as to both law and facts.⁶⁸

The question of the reasonableness of the rate of return is of prime importance, for the question of whether a rate-order is confiscatory depends upon the net income received. If the schedule of rates provides a reasonable return upon the fair value of a utility's property then the order must stand, even though the agency's valuation was too low.⁶⁹

As with most factors integral to confiscation questions, a fair rate of return varies with (1) time, which brings changes in opportunities for investment, the money market, and business conditions gener-

⁶⁴ Columbus Gas & Fuel Co. v. Public Utilities Commission of Ohio (1934) 292 U. S. 398, 78 L. Ed. 1327, 54 S. Ct. 763, 91 A. L. R. 1403.

⁶⁵ Darnell v. Edwards (1917) 244 U. S. 564, 61 L. Ed. 1317, 37 S. Ct. 701.

⁶⁶ Darnell v. Edwards (1917) 244 U. S. 564, 61 L. Ed. 1317, 37 S. Ct. 701.

⁶⁷ United Railways & Electric Co. v. West (1930) 280 U. S. 234, 74 L. Ed. 390, 50 S. Ct. 173.

⁶⁸ United Railways & Electric Co. v. West (1930) 280 U. S. 234, 74 L. Ed. 390, 50 S. Ct. 173.

⁶⁹ Greencastle Water Works Co. v. Public Service Commission of Ind. (D. C. S. D. Ind., 1929) 31 F. (2d) 600.

ally;⁷⁰ (2) place;⁷¹ (3) the type of utility involved,⁷² and with the other facts peculiar to the situation under review. The presence of variable factors makes it impossible to settle the fairness of a rate of return by invoking decisions of the reviewing court made years earlier, upon cases with widely varying facts.⁷³

§ 386. Estimates as to Future Return.

Estimates or prophecies as to the future rate of return may be considered,⁷⁴ but they must be based on evidence,⁷⁵ and must yield to evidence supplied by experience.⁷⁶ Actual experience is evidence tending to overcome predictions based on an accounting system, whether the prophet be utility or agency.⁷⁷

§ 387. Amount of Rate of Return: General Standards.

The return should be reasonably sufficient to assure confidence in the financial soundness of the utility, adequate under efficient and economical management to maintain its credit, and to enable it to raise the money necessary for the proper discharge of its public duties.⁷⁸ The return earned on a utility's property should be equal

⁷⁰ Interstate Commerce Commission.

Dayton-Goose Creek Ry. Co. v. United States (1924) 263 U. S. 456, 68 L. Ed. 388, 44 S. Ct. 169, 33 A. L. R. 472.

State Agencies.

Los Angeles Gas & Electric Corp. v. Railroad Commission (1933) 289 U. S. 287, 77 L. Ed. 1180, 53 S. Ct. 637; United Railways & Electric Co. v. West (1930) 280 U. S. 234, 74 L. Ed. 390, 50 S. Ct. 173; Bluefield Waterworks & Improvement Co. v. Public Service Commission (1923) 262 U. S. 679, 67 L. Ed. 1176, 43 S. Ct. 675.

⁷¹ Denver v. Denver Union Water Co. (1918) 246 U. S. 178, 62 L. Ed. 649, 38 S. Ct. 278.

⁷² Wabash Valley Electric Co. v. Young (1933) 287 U. S. 438, 77 L. Ed. 447, 53 S. Ct. 234; United Railways & Electric Co. v. West (1930) 280 U. S. 234, 74 L. Ed. 390, 50 S. Ct. 173.

⁷³ United Railways & Electric Co. v. West (1930), 280 U. S. 234, 74 L. Ed. 390, 50 S. Ct. 173.

⁷⁴ See Willcox v. Consolidated Gas Co. (1909) 212 U. S. 19, 53 L. Ed. 382, 29 S. Ct. 192.

⁷⁵ West Ohio Gas Co. v. Public Utilities Commission of Ohio (1935) 294 U. S. 79, 79 L. Ed. 773, 55 S. Ct. 324.

⁷⁶ West Ohio Gas Co. v. Public Utilities Commission of Ohio (1935) 294 U. S. 79, 79 L. Ed. 773, 55 S. Ct. 324.

⁷⁷ Lindheimer v. Illinois Bell Telephone Co. (1934) 292 U. S. 151, 78 L. Ed. 1182, 54 S. Ct. 658.

⁷⁸ Los Angeles Gas & Electric Corp. v. Railroad Commission (1933) 289 U. S. 287, 77 L. Ed. 1180, 53 S. Ct. 637; United Railways & Electric Co. v. West (1930) 280 U. S. 234, 74 L. Ed. 390, 50 S. Ct. 173; Bluefield Water-

to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks.⁷⁹ It is obvious that rates of yield on investments in bonds plus brokerage are substantially less than the rate of return required to constitute just compensation for the use of properties in the public service. Bonds rarely constitute the source of all the money required to finance public utilities. And investors insist on higher yields on stock than current rates of interest on bonds.⁸⁰ But there is no constitutional right to profits

works & Improvement Co. v. Public Service Commission (1923) 262 U. S. 679, 67 L. Ed. 1176, 43 S. Ct. 675.

"We said in *Bluefield Waterworks Co. v. Public Service Commission*, supra, pp. 692, 693, that a 'public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures.' We added that the return 'should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties.' And we recognized that 'a rate of return may be reasonable at one time and become too high or too low by changes affecting opportunities for investment, the money market and business conditions generally.' " (Mr. Chief Justice Hughes in *Los Angeles Gas & Electric Corp. v. Railroad Commission* (1933) 289 U. S. 287, 319, 77 L. Ed. 1180, 53 S. Ct. 637.)

"What is a fair return within this principle cannot be settled by invoking decisions of this Court made years ago based upon conditions radically different from those which prevail today. The problem is one to be tested primarily by present day conditions. Annual returns upon capital and enterprise, like wages of employees, cost of maintenance and related expenses, have materially increased the country over. This is common knowledge. A rate of return upon capital invested in street railway lines and other public utilities which might have been proper a few years ago no longer furnishes a safe criterion either for the present or the future. *Lincoln Gas Co. v. Lincoln*, 250 U. S. 256, 268. Nor can a rule be laid down which will apply uniformly to all sorts of utilities. What may be a fair return for one may be inadequate for another, depending upon circumstances, locality and risk." (Mr. Justice Sutherland in *United Railways & Electric Co. v. West* (1930) 280 U. S. 234, 249, 74 L. Ed. 390, 50 S. Ct. 173.)

⁷⁹ *Los Angeles Gas & Electric Corp. v. Railroad Commission* (1933) 289 U. S. 287, 77 L. Ed. 1180, 53 S. Ct. 637; *Bluefield Waterworks & Improvement Co. v. Public Service Commission* (1923) 262 U. S. 679, 67 L. Ed. 1176, 43 S. Ct. 675.

⁸⁰ *McCardle v. Indianapolis Water Co.* (1926) 272 U. S. 400, 71 L. Ed. 316, 47 S. Ct. 144. See *Missouri ex*

such as are realized or anticipated in highly profitable enterprises or speculative ventures.⁸¹ The fact that income to the stockholders from a utility is not taxable to them, because the income tax was paid at the source should be considered in deciding whether the rate of return is adequate.⁸²

§ 388. Specific Returns.

It has been held that a rate of return of 8 per cent. to a Texas railroad in 1921 can hardly be called confiscatory,⁸³ and 8 per cent. for a Galveston electric company in 1921 was held to be adequate.⁸⁴ A return of 7½ per cent. was held adequate for a Nebraska stock yards company in 1934.⁸⁵ A return of 7.44 per cent. for a Baltimore street railway in a period of several years prior to 1930, was held to be adequate.⁸⁶ A return of 7¼ per cent. plus the value of exemption of the net return from federal income taxation, was held to be adequate for a Georgia gas company in 1922.⁸⁷ A rate of return of 7 per cent. was held to be adequate for a Texas gas company in 1933,⁸⁸ for Missouri stock yards in 1934,⁸⁹ for an Oklahoma natural gas company whose field rapidly approached exhaustion in 1936,⁹⁰ for electric service in an Indiana town of 5,000 in 1929,⁹¹ for a toll-

rel. Southwestern Bell Telephone Co. v. Public Service Commission (1923) 262 U. S. 276, 67 L. Ed. 981, 43 S. Ct. 544, 31 A. L. R. 807; Denver v. Denver Union Water Co. (1918) 246 U. S. 178, 62 L. Ed. 649, 38 S. Ct. 278.

⁸¹ Los Angeles Gas & Electric Corp. v. Railroad Commission (1933) 289 U. S. 287, 77 L. Ed. 1180, 53 S. Ct. 637.

⁸² Georgia Railway & Power Co. v. Railroad Commission (1923) 262 U. S. 625, 67 L. Ed. 1144, 43 S. Ct. 680; Galveston Electric Co. v. Galveston (1922) 258 U. S. 388, 66 L. Ed. 678, 42 S. Ct. 351.

⁸³ Dayton-Goose Creek Ry. Co. v. United States (1924) 263 U. S. 456, 68 L. Ed. 388, 44 S. Ct. 169, 33 A. L. R. 472.

⁸⁴ Galveston Electric Co. v. Galveston (1922) 258 U. S. 388, 66 L. Ed. 678, 42 S. Ct. 351.

⁸⁵ Union Stock Yards Co. of Omaha v. United States (D. C. D. Neb., Omaha Div., 1934) 9 F. Supp. 864.

⁸⁶ United Railways & Electric Co. v. West (1930) 280 U. S. 234, 74 L. Ed. 390, 50 S. Ct. 123.

⁸⁷ Georgia Railway & Power Co. v. Railroad Commission (1923) 262 U. S. 625, 67 L. Ed. 1144, 43 S. Ct. 680.

⁸⁸ United Gas Public Service Co. v. Texas (1938) 303 U. S. 123, 82 L. Ed. 702, 58 S. Ct. 483, rehearing denied 303 U. S. 667, 82 L. Ed. 1124, 58 S. Ct. —.

⁸⁹ St. Joseph Stock Yards Co. v. United States (1936) 298 U. S. 38, 80 L. Ed. 1033, 56 S. Ct. 720.

⁹⁰ Cary v. Corporation Commission of Oklahoma (D. C. W. D. Okla. 1936) 17 F. Supp. 772.

⁹¹ Wabash Valley Electric Co. v. Young (1933) 287 U. S. 488, 77 L. Ed. 447, 53 S. Ct. 234.

bridge in Pennsylvania in 1932,⁹² for a California gas company in 1930,⁹³ for a small terminal railroad in St. Louis in 1917,⁹⁴ satisfactory for an Indianapolis water company in 1924,⁹⁵ and necessary to avoid confiscation of the property of a California gas company in the years 1913 to 1916.⁹⁶

A rate of 6½ per cent. was held reasonable for a water company serving an Indiana town of 5,000 in 1929.⁹⁷ But a return of 6.26 per cent. was said to be "clearly inadequate" for a Baltimore street railway company over a period of several years prior to 1930.⁹⁸

A rate of 6 per cent. has been held not confiscatory for a utility in a stable Pennsylvania community in 1937, accustomed to the use of electricity, and close to capital markets with funds readily available for secure investment,⁹⁹ for a Des Moines gas company in 1911,¹ and otherwise.²

A rate of return of 5½ per cent. was held to be confiscatory for an Illinois telephone company in 1923,³ and 5⅓ per cent. inadequate for a Missouri telephone company in 1920.⁴ Where a commission has already arbitrarily undervalued a utility (providing electricity in Ohio in 1920) a rate of 5 per cent. upon that value is so plainly inadequate as to deprive the company of its property without due process of law.⁵

⁹² *Clark's Ferry Bridge Co. v. Public Service Commission* (1934) 291 U. S. 227, 78 L. Ed. 767, 54 S. Ct. 427.

⁹³ *Los Angeles Gas & Electric Corp. v. Railroad Commission* (1933) 289 U. S. 287, 77 L. Ed. 1180, 53 S. Ct. 637.

⁹⁴ *Manufacturers R. Co. v. United States* (1918) 246 U. S. 457, 62 L. Ed. 831, 38 S. Ct. 383.

⁹⁵ *McCardle v. Indianapolis Water Co.* (1926) 272 U. S. 400, 71 L. Ed. 316, 47 S. Ct. 144.

⁹⁶ *Pacific Gas & Electric Co. v. San Francisco* (1924) 265 U. S. 403, 68 L. Ed. 1075, 44 S. Ct. 537.

⁹⁷ *Greencastle Water Works Co. v. Public Service Commission* (D. C. S. D. Ind., 1929) 31 F. (2d) 600.

⁹⁸ *United Railways & Electric Co. v. West* (1930) 280 U. S. 234, 74 L. Ed. 390, 50 S. Ct. 123.

⁹⁹ *Driscoll v. Edison Light & Power Co.* (1939) 307 U. S. 104, 83 L. Ed. 1134, 59 S. Ct. 715, rehearing denied 307 U. S. 650, 83 L. Ed. 1529, 59 S. Ct. 831.

¹ *Des Moines Gas Co. v. Des Moines* (1915) 238 U. S. 153, 59 L. Ed. 1244, 35 S. Ct. 811.

² *Dayton-Goose Creek Ry. Co. v. United States* (1924) 263 U. S. 456, 68 L. Ed. 388, 44 S. Ct. 169, 33 A. L. R. 472.

³ *Smith v. Illinois Bell Telephone Co.* (1930) 282 U. S. 133, 75 L. Ed. 255, 51 S. Ct. 65.

⁴ *Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission* (1923) 262 U. S. 276, 67 L. Ed. 981, 43 S. Ct. 544, 31 A. L. R. 807.

⁵ *Ohio Utilities Co. v. Public Utilities Commission* (1925) 267 U. S. 359, 69 L. Ed. 656, 45 S. Ct. 259.

A rate of return of 4.9 per cent. on a Los Angeles street railway property in 1928, was held to be confiscatory,⁶ as was a rate of 4.53 per cent. for an Ohio gas company operating in 1929-1931.⁷ A rate of return of 4.2812 per cent. was held to be too low for a Denver water company in 1916,⁸ and less than 4 per cent. confiscatory, for a Pennsylvania water company in 1938.⁹ One half of one per cent. return on the property of a Georgia power company in 1934 is clearly confiscatory.¹⁰

§ 389. Where Utility Alleges Rate Is Too High.

A specific, instead of a maximum rate, is not repugnant to the due process clause because it prevents the utility from cutting its rates below cost to meet ruinous competition. The due process clause does not give a right always to have a return upon value of property used in the public service. It does not protect against business hazards. And a municipality has a right to grant a franchise to a rival utility.¹¹

VIII. CONFISCATION IN OTHER CASES

§ 390. Introduction.

Administrative action may result in confiscation respecting matters other than that of rate making. Administrative discrimination is a violation of the due process clause as well as of the equal protection clause of the Constitution. This subdivision should be read in connection with the equal protection chapter.¹²

§ 391. Right to Trial De Novo.

A party alleging denial of a constitutional right is entitled to a trial *de novo* of the constitutional question in these cases as in rate

⁶ Los Angeles Ry. Corp. v. Railroad Commission (D. C. S. D. Cal., 1928) 29 F. (2d) 140, aff'd without consideration of rate of return in 280 U. S. 145, 74 L. Ed. 234, 50 S. Ct. 71.

⁷ West Ohio Gas Co. v. Public Utilities Commission of Ohio (1935) 294 U. S. 63, 79 L. Ed. 761, 55 S. Ct. 316.

⁸ Denver v. Denver Union Water Co. (1918) 246 U. S. 178, 62 L. Ed. 649, 38 S. Ct. 278.

⁹ Beaver Valley Water Co. v. Driscoll (D. C. W. D. Pa., 1938) 23 F. Supp. 795.

¹⁰ Georgia Power & Light Co. v. Georgia Public Service Commission (D. C. N. D. Ga., 1934) 8 F. Supp. 603.

¹¹ Public Service Commission v. Great Northern Utilities Co. (1933) 289 U. S. 130, 77 L. Ed. 1080, 53 S. Ct. 546.

¹² See § 401 et seq.

cases.¹³ For instance, where it is contended that the cost of a grade crossing elimination directed to be made is so unreasonable as to deprive the complaining party of its property without due process of law, it becomes the duty of the court to reach its own independent judgment as to whether the cost is within reasonable limits.¹⁴

§ 392. Recapture Cases.

The Interstate Commerce Act, § 15a,¹⁵ now repealed, directed the commission, in determining value for purposes of recapture, to "give due consideration to all the elements of value recognized by the law of the land for rate making purposes." This meant that, *inter alia*, reproduction cost must be considered.¹⁶ As in rate cases the weight to be given to evidence of current, or reproduction, costs, is not for the court,¹⁷ but it must be considered, along with all other pertinent facts.¹⁸ Where the commission fails to consider such costs, it does not act as directed by Congress, and is therefore acting beyond its statutory authority.¹⁹ Hence the order cannot be sustained because the carrier is permitted to retain an income great enough to negate any suggestion of confiscation.²⁰ The reduction of net operating return provided by the recapture clause is, as near as may be, the same thing as if rates had all been reduced proportionately before collection. One obvious way to make the sum of the rates reasonable so far as the carrier is concerned is to reduce its profit to what is fair.²¹ Hence certain considerations applicable to rate cases are also applicable to recapture cases. And, just as a carrier cannot complain that competitors in the same area enjoy higher rates, if its

¹³ *Lehigh Valley R. Co. v. Board of Public Utility Com'rs* (1928) 278 U. S. 24, 73 L. Ed. 161, 49 S. Ct. 69, 62 A. L. R. 805. See *Mississippi Railroad Commission v. Mobile & O. R. Co.* (1917) 244 U. S. 388, 61 L. Ed. 1216, 37 S. Ct. 602. See also § 462 et seq.

¹⁴ *Lehigh Valley R. Co. v. Board of Public Utility Com'rs* (1928) 278 U. S. 24, 73 L. Ed. 161, 49 S. Ct. 69, 62 A. L. R. 805.

¹⁵ 41 Stat. 456, 488, 49 USCA 15a (4).

¹⁶ *St. Louis & O'Fallon Ry. Co. v. United States* (1929) 279 U. S. 461, 73 L. Ed. 798, 49 S. Ct. 384. See also

§§ 355, 356.

¹⁷ *St. Louis & O'Fallon Ry. Co. v. United States* (1929) 279 U. S. 461, 73 L. Ed. 798, 49 S. Ct. 384.

¹⁸ *St. Louis & O'Fallon Ry. Co. v. United States* (1929) 279 U. S. 461, 73 L. Ed. 798, 49 S. Ct. 384.

¹⁹ *St. Louis & O'Fallon Ry. Co. v. United States* (1929) 279 U. S. 461, 73 L. Ed. 798, 49 S. Ct. 384.

²⁰ *St. Louis & O'Fallon Ry. Co. v. United States* (1929) 279 U. S. 461, 73 L. Ed. 798, 49 S. Ct. 384.

²¹ *Dayton-Goose Creek Ry. Co. v. United States* (1924) 263 U. S. 456, 68 L. Ed. 388, 44 S. Ct. 169, 33 A. L. R. 472.

own bring a fair return,²² so it cannot complain that its return is cut down by recapture while that of others is not, so long as the residual return is fair.²³

§ 393. Orders to Continue Operation.

Where a city has, under the state law, capacity to contract, and a valid contract is made, both parties are bound; the city cannot constitutionally alter the rates fixed, and the company must, in the absence of impossibility of performance carry out its obligations, even at a loss. Such contracts are not permissive franchises, which may be abandoned because rates are unremunerative.²⁴

But in the absence of contract a utility cannot be compelled to continue to operate its system or a branch of its system at a loss.²⁵ And where a lumber company owns a railroad, the test as to whether there is loss in the return upon the railroad, not the net result of the whole enterprise, the entire business of the corporation.²⁶ If a carrier grants to the public an interest in the use of a railway, it may withdraw its grant by discontinuing the use when the use can be kept up only at a loss.²⁷

However, the Constitution does not confer upon the company the right to continue to enjoy a franchise or indeterminate permit and escape the burdens incident to its use, even though fulfillment of an obligation imposed by charter may cause a loss.²⁸ A public utility cannot, because of loss, escape obligations voluntarily assumed. It may be compelled, so long as it retains its charter, to continue operation of a branch or part of a line at a loss.²⁹ The court cannot de-

²² Dayton-Goose Creek Ry. Co. v. United States (1924) 263 U. S. 456, 68 L. Ed. 388, 44 S. Ct. 169, 33 A. L. R. 472. See also § 332.

²³ Dayton-Goose Creek Ry. Co. v. United States (1924) 263 U. S. 456, 68 L. Ed. 388, 44 S. Ct. 169, 33 A. L. R. 472.

²⁴ Columbus Railway, Power, & Light Co. v. Columbus (1919) 249 U. S. 399, 63 L. Ed. 669, 39 S. Ct. 349, 6 A. L. R. 1648.

²⁵ Ft. Smith Light & Traction Co. v. Bourland (1925) 267 U. S. 330, 69 L. Ed. 631, 45 S. Ct. 249; Brooks-Scanlon Co. v. Railroad Commission (1920) 251 U. S. 396, 64 L. Ed. 323, 40 S. Ct. 183.

²⁶ Brooks-Scanlon Co. v. Railroad Commission (1920) 251 U. S. 396, 64 L. Ed. 323, 40 S. Ct. 183.

²⁷ Brooks-Scanlon Co. v. Railroad Commission (1920) 251 U. S. 396, 64 L. Ed. 323, 40 S. Ct. 183.

²⁸ Ft. Smith Light & Traction Co. v. Bourland (1925) 267 U. S. 330, 69 L. Ed. 631, 45 S. Ct. 249; Brooks-Scanlon Co. v. Railroad Commission (1920) 251 U. S. 396, 64 L. Ed. 323, 40 S. Ct. 183.

²⁹ Ft. Smith Light & Traction Co. v. Bourland (1925) 267 U. S. 330, 69 L. Ed. 631, 45 S. Ct. 249; Western & A. R. Co. v. Georgia Public Service Commission (1925) 267 U. S. 493, 69 L. Ed. 753, 45 S. Ct. 409.

termine on any showing made by the carrier that the branch or switch does not work a benefit in increased business. It is a small part of the whole railway, and the mere fact that it may not be profitable by itself cannot be held to be confiscation, even if it involves a loss.³⁰ This is also true even if the system as a whole fails to earn a fair return; the company is at liberty to surrender its franchise and discontinue all operations.³¹ And, where a street railway company, in accepting its franchise, agrees to conform to city ordinances which, *inter alia*, require it (so long as it keeps its franchise) to conform its tracks to any change in the grade of a street, an order denying it permission to abandon a line on which such change is to be made is not arbitrary, where no change in conditions has supervened requiring the agency to permit abandonment.³² The order is not void merely because the line is being operated at a loss, must be practically rebuilt at great expense in order to continue operation, and will probably operate at a loss in the future, nor because the system as a whole is not earning a fair return.³³ It is not a rate order, nor does it involve the reasonableness of service over a particular line; it merely requires continued operation so long as the franchise is retained.³⁴

Where the obligation of a utility to furnish service terminates upon the expiration of its franchise, any attempt by an administrative agency to force continuation of the service thereafter would be writing into the utility's contract an obligation which it did not assume, and has been held to violate the clause prohibiting the impairment of contract obligations.³⁵

Where a state agency's order merely directs the continuance of a practice, such as the issuance of transfers, provided for in a contract, there is no constitutional question as to its validity.³⁶ Where a franchise agreement provided for a certain pressure of gas at a certain price, and the gas company had not maintained that pressure, an

³⁰ Ft. Smith Light & Traction Co. v. Bourland (1925) 267 U. S. 330, 69 L. Ed. 631, 45 S. Ct. 249; Western & A. R. Co. v. Georgia Public Service Commission (1925) 267 U. S. 493, 69 L. Ed. 753, 45 S. Ct. 409.

³¹ Ft. Smith Light & Traction Co. v. Bourland (1925) 267 U. S. 330, 69 L. Ed. 631, 45 S. Ct. 249.

³² Ft. Smith Light & Traction Co. v. Bourland (1925) 267 U. S. 330, 69 L. Ed. 631, 45 S. Ct. 249.

³³ Ft. Smith Light & Traction Co.

v. Bourland (1925) 267 U. S. 330, 69 L. Ed. 631, 45 S. Ct. 249.

³⁴ Ft. Smith Light & Traction Co. v. Bourland (1925) 267 U. S. 330, 69 L. Ed. 631, 45 S. Ct. 249.

³⁵ Union Light, Heat & Power Co. v. Railroad Commission of Commonwealth of Ky. (D. C. E. D. Ky., 1926) 17 F. (2d) 143.

³⁶ Georgia Railway & Power Co. v. Decatur (1923) 262 U. S. 432, 67 L. Ed. 1065, 43 S. Ct. 613.

order directing a reduction in rate and a rebate to those of its customers who had already paid, was not contrary to the Fourteenth Amendment.³⁷

§ 394. Orders to Extend Facilities.

While the reasonableness of a required extension of service of a utility is an administrative question³⁸ the courts will consider whether an administrative order requiring such an extension is confiscatory.³⁹ Thus it will consider the advantages to result to the public from the extensions ordered; it will also consider the investment required to make the necessary additions to property, the cost of furnishing service in the added territory, the effect of the new service upon the company's income as a whole; and if it appears that the power to regulate was so used as to pass beyond the exercise of reasonable judgment and to amount to an infringement of the right of ownership, the order will be held invalid as repugnant to the due process clause.⁴⁰ Under the guise of regulation, the state may not require the company to make large expenditures for the extension of its service when the necessary result will be to compel the company to use the property for the public convenience without just compensation.⁴¹ A requirement that a gas company maintain such an increased pressure as will require great expenditures for plant and distribution facilities, without a provision for a return to the company in accordance with such expenditures constitutes confiscation.⁴² An order to extend gas mains to a growing community is not unreasonable even, where the extension will presently yield only 2½ per cent. to 4 per cent., where there is no showing that the earnings of the company as a whole are inadequate, and every prospect of

³⁷ Oklahoma Natural Gas Co. v. Oklahoma (1922) 258 U. S. 234, 66 L. Ed. 590, 42 S. Ct. 287.

³⁸ See § 505 et seq.

³⁹ New York ex rel. Woodhaven Gas Light Co. v. Public Service Commission (1925) 269 U. S. 244, 70 L. Ed. 255, 46 S. Ct. 83; *People ex rel. New York & Queens Gas Co. v. McCall (1917) 245 U. S. 345, 62 L. Ed. 337, 38 S. Ct. 122; Mississippi Railroad Commission v. Mobile & O. R. Co. (1917) 244 U. S. 388, 61 L. Ed. 1216, 37 S. Ct. 602; Washington ex rel. Oregon R. & Nav. Co. v. Fairchild (1912) 224 U. S. 510, 56 L. Ed. 863, 32 S. Ct. 535; Willcox v. Consolidated

Gas Co. (1909) 212 U. S. 19, 53 L. Ed. 382, 29 S. Ct. 192.

⁴⁰ New York ex rel. Woodhaven Gas Light Co. v. Public Service Commission (1925) 269 U. S. 244, 70 L. Ed. 255, 46 S. Ct. 83.

⁴¹ New York ex rel. Woodhaven Gas Light Co. v. Public Service Commission (1925) 269 U. S. 244, 70 L. Ed. 255, 46 S. Ct. 83; Mississippi Railroad Commission v. Mobile & O. R. Co. (1917) 244 U. S. 388, 61 L. Ed. 1216, 37 S. Ct. 602.

⁴² Willcox v. Consolidated Gas Co. (1909) 212 U. S. 19, 53 L. Ed. 382, 29 S. Ct. 192.

the return upon the extension soon becoming ample.⁴³ Corporations which devote their property to a public use may not pick and choose, serving only the portions of the territory covered by their franchises which it is presently profitable for them to serve and restricting the development of the remaining portions by leaving their inhabitants in discomfort without the service which they alone can render.⁴⁴

§ 395. — To Be Distinguished from Rate Cases.

Where an extension is justified if a non-confiscatory rate can be obtained, even assuming that the presently ordered rate is confiscatory, it does not follow that the extension order is unreasonable or invalid. The case is to be distinguished from a suit to restrain enforcement of legislation prescribing a confiscatory rate. Where the order directs extension, and does not deal with compensation, the rate is not involved. The regulating commission reasonably may assume the utility will take appropriate steps to save its property from confiscation.⁴⁵ In such a case, the company's voluntary extension of facilities to increase sales greatly impairs the weight of the contention that because the cost of service exceeds the rate, the order is arbitrary.⁴⁶

§ 396. Orders Directing Grade Crossing Elimination.

Where a state agency having power to order the elimination of grade-crossings orders a plan of elimination which is unreasonably expensive, the order is confiscatory.⁴⁷ As in cases of confiscation by the establishment of non-compensatory rates, confiscation in this sort of case is a judicial question of the first importance.⁴⁸

§ 397. Order Whose Effect Is to Shift Business to Competing Utility Not Thereby Confiscatory.

An order whose effect is to shift business from one line to another is not thereby rendered confiscatory.⁴⁹

⁴³ * *People ex rel. New York & Queens Gas Co. v. McCall* (1917) 245 U. S. 345, 62 L. Ed. 337, 38 S. Ct. 122.

⁴⁴ * *People ex rel. New York & Queens Gas Co. v. McCall* (1917) 245 U. S. 345, 62 L. Ed. 337, 38 S. Ct. 122.

⁴⁵ *New York ex rel. Woodhaven Gas Light Co. v. Public Service Commission* (1925) 269 U. S. 244, 70 L. Ed. 255, 46 S. Ct. 83.

⁴⁶ *New York ex rel. Woodhaven Gas Light Co. v. Public Service Commission* (1925) 269 U. S. 244, 70 L. Ed.

255, 46 S. Ct. 83.

⁴⁷ *Lehigh Valley R. Co. v. Board of Public Utility Com'rs* (1928) 278 U. S. 24, 73 L. Ed. 161, 49 S. Ct. 69, 62 A. L. R. 805.

⁴⁸ *Lehigh Valley R. Co. v. Board of Public Utility Com'rs* (1928) 278 U. S. 24, 73 L. Ed. 161, 49 S. Ct. 69, 62 A. L. R. 805. See *Mississippi Railroad Commission v. Mobile & O. R. Co.* (1917) 244 U. S. 388, 61 L. Ed. 1216, 37 S. Ct. 602.

⁴⁹ *Chicago, I. & L. R. Co. v. United*

§ 398. Tax Cases.

Where it is alleged not only that a tax assessment is unwarranted by law, in which case an adequate remedy to recover back the taxes would preclude federal equitable relief,⁵⁰ but also that the manner of making the assessment amounted to fraud upon constitutional rights, depriving the taxpayer of property without due process of law, a distinct and well-recognized ground of equity jurisdiction is averred.⁵¹ And continuing violation of constitutional rights may afford a ground for equitable relief.⁵² Where a state drainage district includes a taxpayer within its confines and assesses him not through an exercise of sound and legal legislative discretion, but solely for the benefit of other properties, and with no compensating benefit to him, even indirect, his property is taken without due process of law. Nothing could be more arbitrary. This is a plain abuse of power, and will be enjoined.⁵³ But where a taxpayer has once been taxed by an irrigation district to pay for improvements, assessment being in proportion to benefits received by given land, a subsequent determination of the directors of the district to make a further assessment to make up for the delinquencies of other taxpayers, is not arbitrary or confiscatory, even where the two assessments amount to more than the benefit received. The taxpayers' obligation is general; he is not entitled to have his payment segregated.⁵⁴ *A fortiori*, the suggestion of a theoretical possibility that there may not be an exact and mathematical relation between cost and benefit in particular instances will not overthrow such an old and familiar method of assessment, embodying a well-established principle.⁵⁵ Nor is due process denied by omitting certain property, also benefited by the improvement, from the district assessed,⁵⁶ or by reducing the assessments of others, and assessing upon the entire district the aggregate of these reductions, thus causing some increase to the plain-

States (1926) 270 U. S. 287, 70 L. Ed. 590, 46 S. Ct. 226.

⁵⁰ Johnson v. Wells Fargo & Co. (1915) 239 U. S. 234, 60 L. Ed. 243, 36 S. Ct. 62. See also § 668.

⁵¹ Johnson v. Wells Fargo & Co. (1915) 239 U. S. 234, 60 L. Ed. 243, 36 S. Ct. 62.

⁵² Johnson v. Wells Fargo & Co. (1915) 239 U. S. 234, 60 L. Ed. 243, 36 S. Ct. 62.

⁵³ Myles Salt Co. v. Board of Com'rs of Iberia & St. Mary Drainage Dist. (1916) 239 U. S. 478, 60 L. Ed. 392, 36 S. Ct. 204. See also § 401 et seq.

⁵⁴ Roberts v. Richland Irrigation Dist. (1933) 289 U. S. 71, 77 L. Ed. 1038, 53 S. Ct. 519.

⁵⁵ Butters v. Oakland (1923) 263 U. S. 162, 68 L. Ed. 228, 44 S. Ct. 62.

⁵⁶ Butters v. Oakland (1923) 263 U. S. 162, 68 L. Ed. 228, 44 S. Ct. 62.

tiff.⁵⁷ An issue as to invalidity of a levy merely because excessive does not raise a federal question.⁵⁸

It has long been settled that the due process clause does not preclude a state from valuing, for tax purposes, intangible railroad property—defined as value above the value of physical assets—by deducting the value of tangible property from the value of the entire railroad property.⁵⁹

§ 399. — Burden on Interstate Commerce.

But it is indefensible for a state to fix the value of the total property of a railroad by the value of its stocks and bonds and to assess the proportion of that value that the main track mileage in the state bears to the main track of the whole line, where the cost per mile of the road in the state is much less than elsewhere, and the great valuable terminals of the railroad are outside the state.⁶⁰ But this injustice is not all. No property of an interstate road situated elsewhere can be taken into account by a state unless it can be seen in some plain and fairly intelligible way that it adds to the value of the road and the rights exercised in the state. The only reason for allowing a state to look beyond its borders when it taxes the property of foreign corporations is that it may get the true value of the things within it, when they are part of an organic system of wide extent, that gives them a value above what they otherwise would possess. The purpose is not to expose the heel of the system to a mortal dart—to open to taxation what is not within the state. Hence the possession of a mortgage secured by lands in another state, or of a land grant in another state is no ground for the increase of the tax—whatever it may be—whether a tax on property or an excise on doing business in the state. An allegation of such increase will justify a preliminary injunction against what appears to be an unwarranted interference with interstate commerce and a taking of property without due process of law.⁶¹

⁵⁷ *Butters v. Oakland* (1923) 263 U. S. 162, 68 L. Ed. 228, 44 S. Ct. 62.

Compare administrative discrimination, § 401 et seq.

⁵⁸ *Chapman v. Zobelein* (1915) 237 U. S. 135, 59 L. Ed. 874, 35 S. Ct. 518.

⁵⁹ *Baker v. Drusedow* (1923) 263 U. S. 137, 68 L. Ed. 212, 44 S. Ct. 40.

⁶⁰ *Wallace v. Hines* (1920) 253 U. S. 66, 64 L. Ed. 782, 40 S. Ct. 435.

See *Rowley v. Chicago & N. W. R. Co.* (1934) 293 U. S. 102, 79 L. Ed. 222, 55 S. Ct. 55, rehearing denied 293 U. S. 632, 79 L. Ed. 717, 55 S. Ct. 211.

⁶¹ *Wallace v. Hines* (1920) 253 U. S. 66, 64 L. Ed. 782, 40 S. Ct. 435.

CHAPTER 23

DEPRIVATION OF CITIZENSHIP RIGHTS

§ 400. In General.

One may not be deprived of his rights as a citizen of the United States by administrative determination, as where an agency orders a citizen deported upon finding erroneously that he is an alien. The fact of alienage is essential to the jurisdiction and power to deport of both Congress and its administrative agents. Thus where the respondent properly asserts his citizenship by writ of *habeas corpus* he is entitled to have that question tried *de novo* since it goes to the constitutional power of Congress and its agents.¹

¹ Kessler v. Strecker (1939) 307 U. S. 149, 68 L. Ed. S. 22, 83 L. Ed. 1082, 59 S. Ct. 694; Tod (1923) 263 U. S. 149, 68 L. Ed. S. 221, 44 S. Ct. 54. See also § 262 et United States ex rel. Bilokumsky v. seq.

CHAPTER 24

DENIAL OF EQUAL PROTECTION OF THE LAWS; ADMINISTRATIVE DISCRIMINATION

- § 401. Administrative Discrimination a Matter of Classification.
- § 402. Administrative Discrimination Actionable Where Systematic and Intentional.
- § 403. —Equitable Relief: Adequacy of Remedy at Law.
- § 404. ——Administrative Remedies Must Be Exhausted.
- § 405. Federal Agencies: Equal Protection and Due Process.
- § 406. State Agencies.
- § 407. First Situation: Discriminatory Enforcement Against Certain Members of Class Only.
- § 408. Second Situation: Discriminatory Application of Statute.
- § 409. —Where Discrimination Is Not Systematic.
- § 410. —Different Types of Property May Be Valued Differently.
- § 411. —No Fixed Rule for Tax Valuation.
- § 412. —When Assessment Not Arbitrary: Examples.
- § 413. —Procedure.
- § 414. —Court May Not Determine Administrative Questions.
- § 415. Third Situation: Discriminatory Denial of Benefits to Member of Class Entitled Thereto; Negro Exclusion Cases.
- § 416. —Exclusion from Voting.
- § 417. —Denial of Certificates of Convenience and Necessity to Part of a Class.
- § 418. Miscellaneous Cases.

§ 401. Administrative Discrimination a Matter of Classification.

The equal protection of the laws means that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances, in the enjoyment of their personal and civil rights, that no greater burdens should be laid upon anyone than are laid upon others in the same calling and condition.¹ It has always been held consistent with this general requirement to permit the states to classify the subjects of legislation, and make differences of regulation where substantial differences of condition exist.² Reason-

¹ South Carolina ex rel. Phoenix Mut. Life Ins. Co. v. McMaster (1915) 237 U. S. 63, 59 L. Ed. 839, 35 S. Ct. 504.

² South Carolina ex rel. Phoenix Mut. Life Ins. Co. v. McMaster (1915) 237 U. S. 63, 59 L. Ed. 839, 35 S. Ct. 504.

able classification by an agency does not deprive of due process or equal protection.³

A statute whose terms create an arbitrary classification is void under the equal protection and due process clauses. Administrative discrimination is but one step removed. It consists of arbitrary classification effected by the exercise of discretion of an administrative agency acting under a valid statute.⁴ Just as an attack upon the face of a statute is resolved by application of its terms to the facts to see if an arbitrary classification has been made, so a complaint of administrative discrimination depends upon proof of facts which show that an arbitrary classification has been effected through the exercise of administrative discretion. Questions of classification in violation of the due process and equal protection clauses are mixed questions of law and fact to be decided in the independent judgment of a court.⁵ The usual instances of administrative discrimination occur, (1) when an agency enforces a statute or administrative order of general application against only part of the class to whom it is applicable,⁶ (2) where a statute or order is enforced unequally against those subject to it, as in tax assessment cases where the property of part of those subject to a tax is assessed at a higher proportionate value than the property of others equally subject to the tax,⁷ and (3) where only particular members of a class subject to a statute or order are allowed its benefits, as where qualified negroes are excluded in the selection of jurors.⁸ There are also miscellaneous cases.⁹

³ *South Carolina ex rel. Phoenix Mut. Life Ins. Co. v. McMaster* (1915) 237 U. S. 63, 59 L. Ed. 839, 35 S. Ct. 504.

⁴ *Interstate Commerce Commission.*

Chicago, R. I. & P. R. Co. v. United States (1931) 284 U. S. 80, 76 L. Ed. 177, 52 S. Ct. 87.

State Agencies.

Nashville, C. & St. L. R. Co. v. Browning (1940) 310 U. S. 362, 84 L. Ed. 1254, 60 S. Ct. 968; *Bradley v. Public Utilities Commission of Ohio* (1933) 289 U. S. 92, 77 L. Ed. 1053, 53 S. Ct. 577, 85 A. L. R. 1131; *Sioux City Bridge Co. v. Dakota County* (1923) 260 U. S. 441, 67 L. Ed. 340, 43 S. Ct. 190, 28 A. L. R. 979; *Wichita Railroad & Light Co. v. Public Utili-*

ties Commission (1922) 260 U. S. 48, 67 L. Ed. 124, 43 S. Ct. 51; *Kansas City Southern R. Co. v. Road Improvement Dist.* (1921) 256 U. S. 658, 65 L. Ed. 1151, 41 S. Ct. 604; *South Carolina ex rel. Phoenix Mut. Life Ins. Co. v. McMaster* (1915) 237 U. S. 63, 59 L. Ed. 839, 35 S. Ct. 504; *Rogers v. Alabama* (1904) 192 U. S. 226, 48 L. Ed. 417, 24 S. Ct. 257; *Tarrance v. Florida* (1903) 188 U. S. 519, 47 L. Ed. 572, 23 S. Ct. 402.

⁵ *Wichita Railroad & Light Co. v. Public Utilities Commission* (1922) 260 U. S. 48, 67 L. Ed. 124, 43 S. Ct. 51.

⁶ See § 407.

⁷ See § 408 et seq.

⁸ See § 415.

⁹ See § 418.

Classifications are arbitrary which do not have a natural and obvious relation to the purpose of the regulation.¹⁰ A reasonable classification made by an agency, not merely arbitrary, but based upon real and substantial differences of condition, is not a deprivation of the equal protection of the laws. And there is no merit in the contention that such action is a deprivation of due process of law.¹¹ For instance, a state officer does not deny equal protection when he exercises in good faith an authorized discretion to license some foreign corporations to do intrastate business under specified conditions and to reject others, by requiring companies with less than one-quarter of their reserve on policies of the state invested in state investments to deposit state securities with his department while contenting himself with a surety bond from companies with over one-fourth so invested.¹²

§ 402. Administrative Discrimination Actionable Where Systematic and Intentional.

Appropriate judicial relief may be had against administrative discrimination where the discrimination is systematic and intentional, or there is something which amounts to an intention, or the equivalent of fraudulent purpose, to disregard the fundamental principle of uniformity.¹³

¹⁰ See *Bradley v. Public Utilities Commission of Ohio* (1933) 289 U. S. 92, 77 L. Ed. 1053, 53 S. Ct. 577, 85 A. L. R. 1131.

¹¹ *South Carolina ex rel. Phoenix Mut. Life Ins. Co. v. McMaster* (1915) 237 U. S. 63, 59 L. Ed. 839, 35 S. Ct. 504.

¹² *South Carolina ex rel. Phoenix Mut. Life Ins. Co. v. McMaster* (1915) 237 U. S. 63, 59 L. Ed. 839, 35 S. Ct. 504.

¹³ *Rowley v. Chicago & N. W. Ry. Co.* (1934) 293 U. S. 102, 79 L. Ed. 222, 55 S. Ct. 55, rehearing denied 293 U. S. 632, 79 L. Ed. 717, 55 S. Ct. 211; *Sioux City Bridge Co. v. Dakota County* (1923) 260 U. S. 441, 67 L. Ed. 340, 43 S. Ct. 190, 28 A. L. R. 979; *Sunday Lake Iron Co. v. Wakefield Tp.* (1918) 247 U. S. 350, 62 L. Ed. 1154, 38 S. Ct. 495; **Lehigh Valley R. Co. of New Jersey v. Martin*

(D. C. N. J., 1936) 19 F. Supp. 63. See the other cases cited in the succeeding sections of this chapter.

"Overvaluation resulting from error of judgment will not support a claim of discrimination. There must be something that amounts to an intention, or the equivalent of fraudulent purpose, to disregard the fundamental principle of uniformity. *Sunday Lake Iron Co. v. Wakefield*, 247 U. S. 350. *Sioux City Bridge Co. v. Dakota County*, 260 U. S. 441. *Chicago G. W. Ry. Co. v. Kendall*, 266 U. S. 94. *Iowa-Des Moines Bank v. Bennett*, 284 U. S. 239, 245. *Cumberland Coal Co. v. Board*, 284 U. S. 23, 28." (Mr. Justice Butler in *Rowley v. Chicago & N. W. Ry. Co.* (1934) 293 U. S. 102, 111, 79 L. Ed. 222, 55 S. Ct. 55, rehearing denied 293 U. S. 632, 79 L. Ed. 717, 55 S. Ct. 211.)

Although the criterion is usually said to be proof of "systematic and intentional" discrimination the factor of intent is seldom based upon direct evidence. Almost invariably it is inferred as a matter of course from the circumstantial fact of systematic discrimination. Discrimination can hardly be systematic without being intentional. The courts ordinarily do not deal with motives alone, but with their resultant action.¹⁴ A single instance of discrimination may, however, be so flagrant as to demonstrate fraudulent intent.¹⁵ The question as to what constitutes systematic discrimination depends upon the facts proven in the particular case.¹⁶

The right to relief against administrative discrimination first became clear in the famous case of *Yick Wo v. Hopkins*,¹⁷ and while usually based upon the equal protection clause in the Fourteenth Amendment,¹⁸

¹⁴ *Myles Salt Co. v. Board of Com'rs of Iberia & St. Mary Drainage Dist.* (1916) 239 U. S. 478, 60 L. Ed. 392, 36 S. Ct. 204.

¹⁵ *Great Northern Ry. Co. v. Weeks* (1936) 297 U. S. 135, 80 L. Ed. 532, 56 S. Ct. 426; *Rowley v. Chicago & N. W. Ry. Co.* (1934) 293 U. S. 102, 79 L. Ed. 222, 55 S. Ct. 55, rehearing denied 293 U. S. 632, 79 L. Ed. 717, 55 S. Ct. 211; *Kansas City Southern R. Co. v. Road Improvement Dist.* (1921) 256 U. S. 658, 65 L. Ed. 1151, 41 S. Ct. 604. See *Johnson v. Wells Fargo & Co.* (1915) 239 U. S. 234, 60 L. Ed. 243, 36 S. Ct. 62.

¹⁶ *Rowley v. Chicago & N. W. Ry. Co.* (1934) 293 U. S. 102, 79 L. Ed. 222, 55 S. Ct. 55, rehearing denied 293 U. S. 632, 79 L. Ed. 717, 55 S. Ct. 211.

¹⁷ "For the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion, that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself,

with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States. Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution." (Mr. Justice Matthews in *Yick Wo v. Hopkins* (1886) 118 U. S. 356, 373, 374, 30 L. Ed. 220, 6 S. Ct. 1064.)

¹⁸ *Sioux City Bridge Co. v. Dakota County* (1923) 260 U. S. 441, 67 L. Ed. 340, 43 S. Ct. 190, 28 A. L. R. 979; *Yick Wo v. Hopkins* (1886) 118 U. S. 356, 30 L. Ed. 220, 6 S. Ct. 1064.

"In the case of *Sunday Lake Iron Co. v. Wakefield*, 247 U. S. 350, 352, 353, this Court said:

"The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within

it may also be accorded under the due process clause as relief against palpably arbitrary action.¹⁹

Administrative discrimination may be effected by the cumulative action of two independent agencies fully as well as by the action of a single agency.²⁰

Where denial of equal protection of the laws or due process of law because of administrative discrimination, is claimed, the facts are always tried *de novo*.²¹

§ 403. — Equitable Relief: Adequacy of Remedy at Law.

As in other equitable suits equity will not take jurisdiction where there is an adequate remedy at law to correct the discrimination, such as a writ of mandamus to compel enforcement of a statute equally against all members of a class affected.²² But the adequacy of a remedy at law must be clear; if it is doubtful, equitable relief may be had.²³ Thus equity will intervene where fraud is charged against

the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents. And it must be regarded as settled that intentional systematic undervaluation by state officials of other taxable property in the same class contravenes the constitutional right of one taxed upon the full value of his property. *Raymond v. Chicago Union Traction Co.*, 207 U. S. 20, 35, 37. Analogous cases are *Greene v. Louisville & Interurban R. R. Co.*, 244 U. S. 499, 516, 517, 518; *Cummings v. National Bank*, 101 U. S. 153, 160; *Taylor v. Louisville & Nashville R. R. Co.*, 88 Fed. 350, 364, 365, 372, 374; *Louisville & Nashville R. R. Co. v. Bosworth*, 209 Fed. 380, 452; *Washington Water Power Co. v. Kootenai County*, 270 Fed. 369, 374. (Mr. Chief Justice Taft in *Sioux City Bridge Co. v. Dakota County* (1923) 260 U. S. 441, 445, 67 L. Ed. 340, 43 S. Ct. 190, 28 A. L. R. 979.)

¹⁹ *Baker v. Druesedow* (1923) 263 U. S. 137, 68 L. Ed. 212, 44 S. Ct. 40; *Myles Salt Co. v. Board of Com'rs of Iberia & St. Mary Drainage Dist.*

(1916) 239 U. S. 478, 60 L. Ed. 392, 36 S. Ct. 204; *Yick Wo v. Hopkins*, (1886) 118 U. S. 356, 30 L. Ed. 220, 6 S. Ct. 1064. See *South Carolina ex rel. Phoenix Mut. Life Ins. Co. v. McMaster* (1915) 237 U. S. 63, 59 L. Ed. 839, 35 S. Ct. 504.

²⁰ *Baker v. Druesedow* (1923) 263 U. S. 137, 68 L. Ed. 212, 44 S. Ct. 40; *Southern R. Co. v. Watts* (1923) 260 U. S. 519, 67 L. Ed. 375, 43 S. Ct. 192; **Greene v. Louisville & I. R. Co.* (1917) 244 U. S. 499, 61 L. Ed. 1280, 37 S. Ct. 673.

²¹ *Chicago, B. & Q. R. Co. v. Osborne* (1924) 265 U. S. 14, 68 L. Ed. 878, 44 S. Ct. 431.

²² *Louis K. Liggett Co. v. Lee* (1933) 288 U. S. 517, 77 L. Ed. 929, 53 S. Ct. 481, 85 A. L. R. 699.

²³ *Bohler v. Callaway* (1925) 267 U. S. 479, 69 L. Ed. 745, 45 S. Ct. 431; *Wilson v. Illinois Southern Ry. Co.* (1924) 263 U. S. 574, 68 L. Ed. 456, 44 S. Ct. 203; *Central R. Co. of New Jersey v. Martin* (C. C. A. 3d, 1933) 65 F. (2d) 613; *Western Union Telegraph Co. v. Tax Commission of Ohio* (D. C. S. D. Ohio, E. Div., 1927) 21 F. (2d) 355.

a state tax commission from which appeal is to the circuit court of a county, "for the purpose of having the lawfulness of such assessment inquired into and determined," upon a record of the evidence and proceedings before it, prepared by the commission, with further appeal to the state supreme court. How far such an appeal would be adequate upon a charge of fraud may be doubted.²⁴ A remedy cannot be considered adequate, so as to preclude equitable relief, unless it covers the entire case made by the bill in equity.²⁵ Thus, where a remedy for correcting unequal taxation applies only to state taxes, and the case involves both state and local taxes, an equity court may have jurisdiction.²⁶

When a state statute providing for refund of taxes erroneously paid, to be made by the state auditor, has been held not to empower that officer to correct erroneous assessments, it is not such a legal remedy as will defeat a bill in equity to enjoin enforcement of discriminatory assessments.²⁷ There is no adequate remedy at law where a state tax assessment is final except for equitable intervention,²⁸ or where the remedy is available only in the state court, and not in the federal court.²⁹ There is also no adequate remedy at law where there is no trial *de novo* upon the issue of confiscation. When a charge of systematic and intentional discrimination is made it can only be fully and fairly tried by a court that can hear any and all competent evidence, and is not bound by the findings of the implicated board for which there is any evidence, always easily produced.³⁰ In addition to the fact that the unit of error is not available in the federal court there is the objection that the court can only set aside an executive valuation if errors appear on the face of the record and remit the matter to the same board, which is hardly satisfactory, if the board is seeking to evade the law. On a charge of discrimination there should be a trial *de novo*.³¹ Where taxes are apportioned among

²⁴ *Wilson v. Illinois Southern Ry. Co.* (1924) 263 U. S. 574, 68 L. Ed. 456, 44 S. Ct. 203. S. 479, 69 L. Ed. 745, 45 S. Ct. 43. See also § 668.

²⁵ *Greene v. Louisville & I. R. Co.* (1917) 244 U. S. 499, 61 L. Ed. 1280, 37 S. Ct. 673. ²⁹ *Chicago, B. & Q. R. Co. v. Osborne* (1924) 265 U. S. 14, 68 L. Ed. 878, 44 S. Ct. 431.

²⁶ *Greene v. Louisville & I. R. Co.* (1917) 244 U. S. 499, 61 L. Ed. 1280, 37 S. Ct. 673. ³⁰ *Chicago, B. & Q. R. Co. v. Osborne* (1924) 265 U. S. 14, 68 L. Ed. 878, 44 S. Ct. 431. See also § 262 et seq.

²⁷ *Greene v. Louisville & I. R. Co.* (1917) 244 U. S. 499, 61 L. Ed. 1280, 37 S. Ct. 673. ³¹ *Chicago, B. & Q. R. Co. v. Osborne* (1924) 265 U. S. 14, 68 L. Ed. 878, 44 S. Ct. 431. See also § 262 et seq.

²⁸ *Bohler v. Callaway* (1925) 267 U. S. 411.

five counties, and the taxpayer, a railroad, alleges that the state tax board erroneously and fraudulently overvalued its property, the right of full defense in suits to collect in each of the five counties is not an adequate remedy.³² Not only would the suits be many, but there would be insuperable difficulty in determining what proper assessment against the whole road should be, and in apportioning the due share to the county concerned. This difficulty would recur in each of the five counties, with not improbably different results in each.³³

§ 404. — Administrative Remedies Must Be Exhausted.

No case for equity jurisdiction may ordinarily be made unless all available and appropriate administrative remedies for correcting the discrimination complained of have been exhausted.³⁴

§ 405. Federal Agencies: Equal Protection and Due Process.

There is no equal protection clause in the Fifth Amendment³⁵ and therefore administrative discrimination by federal agencies may be assailed under the due process clause only.³⁶ However, the guarantees of the equal protection clause have been indicated to be implicit in the due process clause to some extent at least.³⁷

§ 406. State Agencies.

A claim of administrative discrimination by state officials obviously raises a federal question.³⁸ A discriminatory exercise of discretion by an official whose duties are entirely ministerial, and whose powers do not extend to any exercise of discretion, so that such action is contrary to state law, is nevertheless state action, not merely the

³² *Wilson v. Illinois Southern Ry. Co.* (1924) 263 U. S. 574, 68 L. Ed. 456, 44 S. Ct. 203.

³³ *Wilson v. Illinois Southern Ry. Co.* (1924) 263 U. S. 574, 68 L. Ed. 456, 44 S. Ct. 203.

³⁴ *Keokuk & Hamilton Bridge Co. v. Salm* (1922) 258 U. S. 122, 66 L. Ed. 496, 42 S. Ct. 207. See also § 226 et seq.

³⁵ *La Belle Iron Works v. United States* (1921) 256 U. S. 377, 65 L. Ed. 998, 41 S. Ct. 528.

³⁶ *La Belle Iron Works v. United States* (1921) 256 U. S. 377, 65 L. Ed. 998, 41 S. Ct. 528.

³⁷ *Sims v. Rives* (1936) 66 App. D. C. 24, 84 F. (2d) 871, cert. den. 298 U. S. 682, 80 L. Ed. 1402, 56 S. Ct. 960; *United States v. Yount* (D. C. W. D. Pa., 1920) 267 Fed. 861; *United States v. Armstrong* (D. C. D. Ind., 1920) 265 Fed. 683; *United States v. New York, N. H. & H. R. Co.* (C. C. D. Mass., 1908) 165 Fed. 742; *Lappin v. District of Columbia* (1903) 22 App. D. C. 68; *State Tax Commission v. Baltimore Nat. Bank* (1938) 174 Md. 403, 199 Atl. 119.

³⁸ *Western Union Telegraph Co. v. Tax Commission of Ohio* (D. C. S. D. Ohio, E. Div., 1927) 21 F. (2d) 355.

wrongful act of a private person, and constitutes administrative discrimination against which appropriate judicial relief may be had.³⁹ If the bill states ground for federal equity jurisdiction and shows that the administration of the tax laws of a state results in a systematic and intentional discrimination under the laws of that state, the federal court may grant relief by injunction under the state law, without deciding the federal constitutional question upon which jurisdiction of the bill is based.⁴⁰

§ 407. First Situation: Discriminatory Enforcement Against Certain Members of Class Only.

Where a statute or administrative order is enforced systematically against a portion only of those subject to it, a party against whom enforcement is directed may enjoin enforcement as to him.⁴¹ Where, however, failure to enforce against others is desultory only and not systematic, no relief may be had.⁴² Discriminatory enforcement equivalent to enforcement in furtherance of a fraudulent purpose may be enjoined in an appropriate case, even when not systematic,⁴³ and enforcement arbitrary in any respect will be enjoined.⁴⁴ Where several attempts to enforce a statute against particular members of a class have been enjoined any attempt to apply the statute to a member of the class will likewise be enjoined as arbitrary and capricious.⁴⁵

The mere omission of certain property, also benefited, from a district taxed for improvements, is not ground for relief.⁴⁶ The mere exclusion of public-owned land benefiting by an improvement from the burden of any assessment is not such a denial of equality as to show, in a single instance, existence of a fraudulent purpose.⁴⁷ Where

³⁹ *Iowa-Des Moines Nat. Bank v. Bennett* (1931) 284 U. S. 239, 76 L. Ed. 265, 52 S. Ct. 133.

⁴⁰ *Bohler v. Callaway* (1925) 267 U. S. 479, 69 L. Ed. 745, 45 S. Ct. 431.

⁴¹ *Yick Wo v. Hopkins* (1886) 118 U. S. 356, 30 L. Ed. 220, 6 S. Ct. 1064. See *Louis K. Liggett Co. v. Lee* (1933) 288 U. S. 517, 77 L. Ed. 929, 53 S. Ct. 481, 85 A. L. R. 699.

⁴² *Thompson v. Spear* (C. C. A. 5th, 1937) 91 F. (2d) 430, cert. den. 302 U. S. 762, 82 L. Ed. 592, 58 S. Ct. 409.

⁴³ *Goldsmith v. Geo. G. Prendergast*

Const. Co. (1920) 252 U. S. 12, 64 L. Ed. 427, 40 S. Ct. 273.

⁴⁴ *Miller v. Standard Nut Margarine Co. of Florida* (1932) 284 U. S. 498, 76 L. Ed. 422, 52 S. Ct. 260.

⁴⁵ *Miller v. Standard Nut Margarine Co. of Florida* (1932) 284 U. S. 498, 76 L. Ed. 422, 52 S. Ct. 260.

⁴⁶ *Butters v. Oakland* (1923) 263 U. S. 162, 68 L. Ed. 228, 44 S. Ct. 62.

⁴⁷ *Goldsmith v. Geo. G. Prendergast* Const. Co. (1920) 252 U. S. 12, 64 L. Ed. 427, 40 S. Ct. 273.

a state commission diligently attempted to enforce oil proration orders, but was unable to do so because of inadequate funds and mild penalties, and was not negligent or wilful in its failure to enforce, one against whom the orders actually were enforced was not thereby denied the equal protection of the laws.⁴⁸ Where a commission omits other concerns on the same footing as the plaintiff from the operation of its order, in the honest belief that these concerns do not do a sufficient volume of business to be within the regulatory statute, there is no denial of equal protection.⁴⁹

An order requiring disclosure of information under the Shipping Act of 1916, as to the rates previously charged, was not invalid under the Fifth Amendment because the company against whom the order was directed was the only company required to file such records. This was justified on the ground that the gravamen of the complaint was the failure of other carriers to adhere to their schedule of rates, and the bill did not show that compliance with the order would restrict the appellant's freedom to deviate in the future from the past rates disclosed.⁵⁰ This decision was made despite the party's claim that the purpose of the order was to foster unfair competition on the part of others and ruin its business by turning over confidential records to its competitors. Discrimination in fact which is not directly complained of as depriving a party of precise legal rights is no ground for invalidating an order as arbitrary.⁵¹

§ 408. Second Situation: Discriminatory Application of Statute.

Where a statute is unequally and systematically administered among those subject to it, a party discriminated against may have relief to the extent of the discrimination. The principle instance of this type of administrative discrimination is inequality in tax assessment by local boards. The commonest illustration occurs where a local tax board assesses property at a small fraction of its value, except railroad property which is assessed at full value. Where taxes are systematically assessed unequally against members of the class affected, a member discriminated against is entitled to appropriate judicial relief against the excessive assessment and its consequences.⁵²

⁴⁸ *Thompson v. Spear* (C. C. A. 5th, 1937) 91 F. (2d) 430, cert. den. 302 U. S. 762, 82 L. Ed. 592, 58 S. Ct. 409.

⁴⁹ *Terminal Taxicab Co. v. Kutz* (1916) 241 U. S. 252, 60 L. Ed. 984, 36 S. Ct. 583.

⁵⁰ *Isbrandtsen-Moller Co. v. United States* (1937) 300 U. S. 139, 81 L. Ed.

562, 57 S. Ct. 407.

⁵¹ *Isbrandtsen-Moller Co. v. United States* (1937) 300 U. S. 139, 81 L. Ed. 562, 57 S. Ct. 407.

⁵² *State Agencies.*

Iowa-Des Moines Nat. Bank v. Bennett (1931) 284 U. S. 239, 76 L. Ed. 265, 52 S. Ct. 133; *Cumberland*

Tax assessments must not be otherwise arbitrary.⁵³ Uniformity in taxation implies equality in the burden of taxation, which cannot exist without uniformity in the mode of assessment as well as in the rate of taxation. Discrimination in either case is therefore actionable.⁵⁴ Formal adherence to the tax law will not save a system of taxation which is discriminatory in fact.⁵⁵ Thus where the law required assessment on the basis of full fair cash value, collection of a tax assessed on that basis may be enjoined as discriminatory, where it is shown that other property is systematically assessed at less than sixty per cent. of its full cash value;⁵⁶ or that the complainant's property is assessed at the statutory requisite of fair market value while other property is systematically assessed at less than twenty-five per cent. of such value.⁵⁷ Where a state statutory scheme of taxation provides for the assessment of railroad property by a state board, other property being assessed by county or other local boards, administrative discrimination results if railroad property is systematically assessed at a greater percentage of its cash value than is the other property, even though all railroads are treated alike.⁵⁸ The rule includes the case where an apparently uniform system of assessment is applied to varying actual values. If the result is systematically unequal and discriminatory, judicial relief may be had.⁵⁹

Coal Co. v. Board of Revision (1931) 284 U. S. 23, 76 L. Ed. 146, 52 S. Ct. 48; Bohler v. Callaway (1925) 267 U. S. 479, 69 L. Ed. 745, 45 S. Ct. 431; Chicago G. W. R. Co. v. Kendall (1924) 266 U. S. 94, 69 L. Ed. 183, 45 S. Ct. 55; *Southern R. Co. v. Watts (1923) 260 U. S. 519, 67 L. Ed. 375, 43 S. Ct. 192; Sioux City Bridge Co. v. Dakota County (1923) 260 U. S. 441, 67 L. Ed. 340, 43 S. Ct. 190, 28 A. L. R. 979; Keokuk & Hamilton Bridge Co. v. Salm (1922) 258 U. S. 122, 66 L. Ed. 496, 42 S. Ct. 207; Louisville & N. R. Co. v. Greene (1917) 244 U. S. 522, 61 L. Ed. 1291, 37 S. Ct. 683; Greene v. Louisville & I. R. Co. (1917) 244 U. S. 499, 61 L. Ed. 1280, 37 S. Ct. 673; Illinois Cent. R. Co. v. Greene (1917) 244 U. S. 555, 61 L. Ed. 1309, 37 S. Ct. 697; Central R. Co. of New Jersey v. Martin (C. C. A. 3d, 1933)

65 F. (2d) 613. See also § 413.

⁵³ See § 412.

⁵⁴ Greene v. Louisville & I. R. Co. (1917) 244 U. S. 499, 61 L. Ed. 1280, 37 S. Ct. 673.

⁵⁵ Louisville & N. R. Co. v. Greene (1917) 244 U. S. 522, 61 L. Ed. 1291, 37 S. Ct. 683.

⁵⁶ Louisville & N. R. Co. v. Greene (1917) 244 U. S. 522, 61 L. Ed. 1291, 37 S. Ct. 683.

⁵⁷ Bohler v. Callaway (1925) 267 U. S. 479, 69 L. Ed. 745, 45 S. Ct. 431.

⁵⁸ Baker v. Druesedow (1923) 263 U. S. 137, 68 L. Ed. 212, 44 S. Ct. 40; *Greene v. Louisville & I. R. Co. (1917) 244 U. S. 499, 61 L. Ed. 1280, 37 S. Ct. 673. But see Nashville, C. & St. L. Ry. v. Browning (1940) 310 U. S. 362, 84 L. Ed. 1254, 60 S. Ct. 968.

⁵⁹ Cumberland Coal Co. v. Board of Revision (1931) 284 U. S. 23, 76 L. Ed. 146, 52 S. Ct. 48.

§ 409. — Where Discrimination Is Not Systematic.

No relief may be had, however, where there is no proof of systematic discrimination,⁶⁰ unless there is something else that in legal effect is the equivalent of intention or fraudulent purpose to overvalue the property and so to set at naught fundamental principles that safeguard the taxpayers rights and property.⁶¹ Thus a charge of administrative discrimination is not supported by mere overvaluation,⁶² or mere error of judgment in valuation. The good faith of tax officers and the validity of their action are assumed.⁶³ An issue as to the invalidity of a levy merely because excessive does not raise a federal question.⁶⁴

§ 410. — Different Types of Property May Be Valued Differently.

Property owners of different classes may be taxed differently by administrative action, just as they may by statute.⁶⁵ Thus where a state sets up different taxation schemes, utility property may be taxed at a different rate or value than property of different classes. As has been pointed out, the problem remains essentially one of classification under a particular statute.⁶⁶

⁶⁰ *Rowley v. Chicago & N. W. Ry. Co.* (1934) 293 U. S. 102, 79 L. Ed. 222, 55 S. Ct. 55, rehearing denied 293 U. S. 632, 79 L. Ed. 717, 55 S. Ct. 211; *Southern R. Co. v. Watts* (1923) 260 U. S. 519, 67 L. Ed. 375, 43 S. Ct. 192. See *Chicago G. W. R. Co. v. Kendall* (1924) 266 U. S. 94, 69 L. Ed. 183, 45 S. Ct. 55.

⁶¹ *Great Northern Ry. Co. v. Weeks* (1936) 297 U. S. 135, 80 L. Ed. 532, 56 S. Ct. 426; *Rowley v. Chicago & N. W. Ry. Co.* (1934) 293 U. S. 102, 79 L. Ed. 222, 55 S. Ct. 55, rehearing denied 293 U. S. 632, 79 L. Ed. 717, 55 S. Ct. 211.

⁶² *Great Northern Ry. Co. v. Weeks* (1936) 297 U. S. 135, 80 L. Ed. 532, 56 S. Ct. 426.

⁶³ *State Agencies.*

Great Northern Ry. Co. v. Weeks (1936) 297 U. S. 135, 80 L. Ed. 532, 56 S. Ct. 426; *Rowley v. Chicago &*

N. W. Ry. Co. (1934) 293 U. S. 102, 79 L. Ed. 222, 55 S. Ct. 55, rehearing denied 293 U. S. 632, 79 L. Ed. 717, 55 S. Ct. 211; *Chicago G. W. R. Co. v. Kendall* (1924) 266 U. S. 94, 69 L. Ed. 183, 45 S. Ct. 55; *Sioux City Bridge Co. v. Dakota County* (1923) 260 U. S. 441, 67 L. Ed. 340, 43 S. Ct. 190, 28 A. L. R. 979; *Sunday Lake Iron Co. v. Wakefield Tp.* (1918) 247 U. S. 350, 62 L. Ed. 1154, 38 S. Ct. 495; *Coulter v. Louisville & N. R. Co.* (1905) 196 U. S. 599, 49 L. Ed. 615, 25 S. Ct. 342.

⁶⁴ *Chapman v. Zobelein* (1915) 237 U. S. 135, 59 L. Ed. 874, 35 S. Ct. 518.

⁶⁵ *Nashville, C. & St. L. Ry. v. Browning* (1940) 310 U. S. 362, 84 L. Ed. 1254, 60 S. Ct. 968.

⁶⁶ *Nashville, C. & St. L. Ry. v. Browning* (1940) 310 U. S. 362, 84 L. Ed. 1254, 60 S. Ct. 968.

§ 411. — No Fixed Rule for Tax Valuation.

The use of a particular method of valuation is not necessarily required.⁶⁷ Since no particular method of valuation is required to avoid administrative discrimination, no fixed rule of assessment exists. For instance, the ascertainment of the value of such enterprises as a railroad system is not a matter of arithmetical calculation, and is not governed by any fixed and definite rule. Facts of great variety and number, estimates that are exact and those that are approximations, forecasts based on probabilities and contingencies have bearing and may properly be taken into account.⁶⁸

Similarly, the apportionment of system value between a state and the rest of the system without the state is quite like valuation of the whole. The determination is to be made in the exercise of a reasonable judgment, based on facts so pertinent and significant as to be of controlling weight as indications of the value of the property.⁶⁹ Thus there was no discrimination where a state board considered (the system value being undisputed) cost of reproduction of property within the state based upon an estimate of the Interstate Commerce Commission, less depreciation, reduced by comparison with net operating revenue rates for the year and with other railroad properties in the state; and after notice, hearing, and consideration of the railroad's valuation thereat, further reduced the assessment by over \$100,000 by averaging gross operating revenue ratio, net operating ratio for the year and the past five years, traffic units ratio, accepting the railroad's figure, use of rolling stock rates, accepting the railroad's figure, and mileage ratio, where every item but mileage ratio indicated undervaluation, even though the use of mileage ratio alone would have been arbitrary.⁷⁰ In apportionment cases, where the evidence requires a finding that the railroad in one state in the system is clearly worth much less per mile than the average of the system,

⁶⁷ * *Greene v. Louisville & I. R. Co.* (1917) 244 U. S. 499, 61 L. Ed. 1280, 37 S. Ct. 673. See *Southern R. Co. v. Watts* (1923) 260 U. S. 519, 67 L. Ed. 375, 43 S. Ct. 192.

⁶⁸ *Rowley v. Chicago & N. W. Ry. Co.* (1934) 293 U. S. 102, 79 L. Ed. 222, 55 S. Ct. 55, rehearing denied 293 U. S. 632, 79 L. Ed. 717, 55 S. Ct. 211.

⁶⁹ *Rowley v. Chicago & N. W. Ry. Co.* (1934) 293 U. S. 102, 79 L. Ed. 222, 55 S. Ct. 55, rehearing denied 293 U. S. 632, 79 L. Ed. 717, 55 S. Ct. 211.

⁷⁰ *Rowley v. Chicago & N. W. Ry. Co.* (1934) 293 U. S. 102, 79 L. Ed. 222, 55 S. Ct. 55, rehearing denied 293 U. S. 632, 79 L. Ed. 717, 55 S. Ct. 211.

the use of mileage as the sole basis for apportionment is arbitrary and constitutes discrimination.⁷¹

§ 412. — When Assessment Not Arbitrary: Examples.

Where tax officers have assessed land once according to benefits received from improvements, and a second assessment is levied to make up for the delinquencies of other taxpayers, the taxpayer's allegation that his total tax is greater than his benefits from the improvements will not support a claim that the second assessment was arbitrary and within the prohibitions of the Fourteenth Amendment.⁷² Nor is due process denied by omitting certain property, also benefited by the improvement, from the district assessed, or by reducing the assessments of others, and assessing upon the entire district the aggregate of these reductions, thus causing some increase to the plaintiff.⁷³ Where the assessment of tangible and intangible property is made by the separate action of two independent boards using different methods, but the taxes on both are laid at the same rate, collected by the same officers, and treated by the state courts as part of a single tax, the over assessment of either type of property is not discrimination if the average of the two assessments is not above the percentage assessed to other persons and property.⁷⁴ An assessment is not an unlawful discrimination against the class of persons who own mineral rights separate from the surface estate, in that mineral rights are taxed to such owners, and not to those who own both the surface and mineral estates, where the mineral rights of the latter owners are untaxed only when owner and assessor do not know of the existence of ore.⁷⁵

§ 413. — Procedure.

Relief from administrative discrimination in tax cases may be accomplished by mandamus to compel a refund of the discriminatory

⁷¹Rowley v. Chicago & N. W. Ry. Co. (1934) 293 U. S. 102, 79 L. Ed. 222, 55 S. Ct. 55, rehearing denied 293 U. S. 632, 79 L. Ed. 717, 55 S. Ct. 211. See Wallace v. Hines (1920) 253 U. S. 66, 64 L. Ed. 782, 40 S. Ct. 435.

⁷²Roberts v. Richland Irrigation Dist. (1933) 289 U. S. 71, 77 L. Ed. 1038, 53 S. Ct. 519; Butters v. Oakland (1923) 263 U. S. 162, 68 L. Ed.

228, 44 S. Ct. 62.

⁷³Butters v. Oakland (1923) 263 U. S. 162, 68 L. Ed. 228, 44 S. Ct. 62. See also § 390 et seq.

⁷⁴See Baker v. Druesedow (1923) 263 U. S. 137, 68 L. Ed. 212, 44 S. Ct. 40.

⁷⁵Downman v. Texas (1913) 231 U. S. 353, 58 L. Ed. 264, 34 S. Ct. 62.

excess exacted,⁷⁶ suit to enjoin collection of the tax or discriminatory percentage thereof,⁷⁷ suit to enjoin enforcement of the assessment or discriminatory percentage thereof,⁷⁸ readjustment of an assessment in state review proceedings, and suit to restrain sale of land for unpaid taxes levied upon the basis of a discriminatory assessment.⁷⁹ Nearly all these cases involve state agencies and most of them originate in state courts.

§ 414. — Court May Not Determine Administrative Questions.

In a suit to enjoin collection of a discriminatory assessment, if the assessment is found to be illegal the trial court has no jurisdiction to determine the base or amount of the tax that in its view might legally be exacted. The state, notwithstanding any holding that the assessment is unconstitutional, should be left free to value the property again.⁸⁰ This function is within the legislative or administrative province, with which the judicial power may not interfere.⁸¹ Where the taxpayer's remedy is by petition in equity to enjoin the assessment only, and nothing indicates that the court is empowered to make an administrative assessment, the proceeding is judicial, not administrative.⁸²

§ 415. Third Situation: Discriminatory Denial of Benefits to Member of Class Entitled Thereto; Negro Exclusion Cases.

Administrative discrimination is likewise actionable where its effect is to deny the benefits of a statute or order to a member of the class entitled thereto. Most cases in this category are negro exclusion cases.

⁷⁶ Iowa-Des Moines National Bank v. Bennett (1931) 284 U. S. 239, 76 L. Ed. 265, 52 S. Ct. 133.

⁷⁷ Great Northern Ry. Co. v. Weeks (1936) 297 U. S. 135, 80 L. Ed. 532, 56 S. Ct. 426; Bohler v. Callaway (1925) 267 U. S. 479, 69 L. Ed. 745, 45 S. Ct. 431; Wilson v. Illinois Southern Ry. Co. (1924) 263 U. S. 574, 68 L. Ed. 456, 44 S. Ct. 203.

⁷⁸ Chicago G. W. R. Co. v. Kendall (1924) 266 U. S. 94, 69 L. Ed. 183, 45 S. Ct. 55; Greene v. Louisville & I. R. Co. (1917) 244 U. S. 499, 61 L. Ed. 1280, 37 S. Ct. 673; Louisville & N. R. Co. v. Greene (1917) 244 U. S. 522, 61 L. Ed. 1291, 37 S. Ct. 683;

Illinois Cent. R. Co. v. Greene (1917) 244 U. S. 555, 61 L. Ed. 1309, 37 S. Ct. 697.

⁷⁹ Myles Salt Co. v. Board of Com'rs of Iberia & St. Mary Drainage Dist. (1916) 239 U. S. 478, 60 L. Ed. 392, 36 S. Ct. 204.

⁸⁰ Rowley v. Chicago & N. W. Ry. Co. (1934) 293 U. S. 102, 79 L. Ed. 222, 55 S. Ct. 55, rehearing denied 293 U. S. 632, 79 L. Ed. 717, 55 S. Ct. 211. See also § 505 et seq.

⁸¹ See §§ 505, 788 et seq.

⁸² Bohler v. Callaway (1925) 267 U. S. 479, 69 L. Ed. 745, 45 S. Ct. 431.

Where by the exercise of administrative discretion negroes are systematically and intentionally excluded from jury panels in a particular locality, a conviction of a negro by a jury in that locality must be reversed on the ground that the defendant has been denied the equal protection of the laws.⁸³ This rule applies to grand juries as well as petit juries,⁸⁴ and may be tested by motion to quash the indictment⁸⁵ though not by a writ of habeas corpus.⁸⁶ Discrimination of this type is not established by the mere fact that there were no negroes on the jury which convicted the defendant,⁸⁷ or by proof that the jury commissioners did not give the negro race full pro rata representation with the white race in the selection of grand and petit jurors.⁸⁸ It is not enough to show that evil administration of a statute is possible. Actual discrimination must be shown to have been systematic or otherwise evil.⁸⁹

The question of systematic and intentional exclusion by the administrative agency is tried independently of the administrative proceedings.⁹⁰ As with other administrative discrimination cases, the factor of intention is seldom found from direct evidence, but is usually inferred as a matter of course from the fact of systematic discrimination, although the word "intentional" is also used in the opinions.

§ 416. — Exclusion from Voting.

Attempts to exclude negroes from voting rights have been made, for the most part, by statute, involving no exercise of administrative

⁸³ *Pierre v. Louisiana* (1939) 306 U. S. 354, 83 L. Ed. 757, 59 S. Ct. 536; *Hollins v. Oklahoma* (1935) 295 U. S. 394, 79 L. Ed. 1500, 55 S. Ct. 784; *Norris v. Alabama* (1935) 294 U. S. 587, 79 L. Ed. 1074, 55 S. Ct. 579; *Rogers v. Alabama* (1904) 192 U. S. 226, 48 L. Ed. 417, 24 S. Ct. 257; *Carter v. Texas* (1900) 177 U. S. 442, 44 L. Ed. 839, 20 S. Ct. 687; **Neal v. Delaware* (1880) 103 U. S. 370, 26 L. Ed. 567. See *Strauder v. West Virginia* (1879) 100 U. S. 303, 25 L. Ed. 664.

⁸⁴ *Thomas v. Texas* (1909) 212 U. S. 278, 53 L. Ed. 512, 29 S. Ct. 393.

⁸⁵ **Neal v. Delaware* (1880) 103 U. S. 370, 26 L. Ed. 567; *Rogers v. Alabama* (1904) 192 U. S. 226, 48 L. Ed.

417, 24 S. Ct. 257.

⁸⁶ *Andrews v. Swartz* (1895) 156 U. S. 272, 39 L. Ed. 422, 15 S. Ct. 389.

⁸⁷ *Thomas v. Texas* (1909) 212 U. S. 278, 53 L. Ed. 512, 29 S. Ct. 393; *Martin v. Texas* (1906) 200 U. S. 316, 50 L. Ed. 497, 26 S. Ct. 338.

⁸⁸ *Thomas v. Texas* (1909) 212 U. S. 278, 53 L. Ed. 512, 29 S. Ct. 393.

⁸⁹ *Tarrance v. Florida* (1903) 188 U. S. 519, 47 L. Ed. 572, 23 S. Ct. 402; *Williams v. Mississippi* (1898) 170 U. S. 213, 42 L. Ed. 1012, 18 S. Ct. 583.

⁹⁰ See *Pierre v. Louisiana* (1939) 306 U. S. 354, 83 L. Ed. 757, 59 S. Ct. 536; *Norris v. Alabama* (1935) 294 U. S. 587, 79 L. Ed. 1074, 55 S. Ct. 579.

discretion. Where, however, a statute empowers a state executive committee of a political party to determine the voting qualifications of its members, exclusion of negroes by such a committee is unlawful.⁹¹ The state convention of a political party is not, however, such an agency, and may discriminate as to who shall vote in a party primary.⁹² Claimed administrative discrimination of this character has been judicially reviewed in a suit for damages against the election officials who prevented the negro from voting.⁹³

§ 417. — Denial of Certificates of Convenience and Necessity to Part of a Class.

Where a state commission denies certificates of convenience and necessity to common carriers by motor because highway congestion makes further certification unsafe, this is not unconstitutional discrimination in favor of carriers previously certificated. Classification based on priority of authorized operation has a natural and obvious relation to the purpose of the regulation, which is safety, a subject within the state's police power.⁹⁴

§ 418. Miscellaneous Cases.

Where a state drainage district includes a taxpayer within its confines and assesses him, not through an exercise of sound and legal legislative discretion, but solely for the benefit of other properties, and with no compensating benefit, even indirect, to the taxpayer, his property is taken without due process of law. Nothing could be more arbitrary. This is a plain abuse of power, and subject to injunction.⁹⁵

⁹¹ *Nixon v. Condon* (1932) 286 U. S. 73, 76 L. Ed. 984, 52 S. Ct. 484, 88 A. L. R. 458.

⁹² *Grove v. Townsend* (1935) 295 U. S. 45, 79 L. Ed. 1292, 55 S. Ct. 622, 97 A. L. R. 680.

⁹³ *Nixon v. Condon* (1932) 286 U. S. 73, 76 L. Ed. 984, 52 S. Ct. 484, 88 A. L. R. 458.

⁹⁴ *Bradley v. Public Utilities Commission of Ohio* (1933) 289 U. S. 92, 77 L. Ed. 1053, 53 S. Ct. 577, 85 A. L. R. 1131.

⁹⁵ *Myles Salt Co. v. Board of Com'rs of Iberia & St. Mary Drainage Dist.* (1916) 239 U. S. 478, 60 L. Ed. 392, 36 S. Ct. 204. See also § 390 et seq.

CHAPTER 25

FAILURE TO CONFORM TO OTHER CONSTITUTIONAL REQUIREMENTS

§ 419. Introduction.

§ 420. Undue Burden on Interstate Commerce.

§ 421. Impairing the Obligation of Contracts.

§ 422. Deprivation of the Rights of Free Speech and a Free Press.

§ 419. Introduction.

Administrative action must not contravene other provisions of the Constitution. It must not cast an undue burden on interstate commerce,¹ impair a contract obligation,² or violate the rights of free speech and a free press.³

§ 420. Undue Burden on Interstate Commerce.

A state administrative agency may not make an order which has the effect of casting an undue burden on interstate commerce.⁴ Thus a state administrative order which required additional service on a branch railroad line already adequately supplied with trains, was held to be invalid as imposing an undue burden upon interstate commerce.⁵ And action of a state agency in exacting an exorbitant fee from an interstate railroad for giving its approval to a proposed bond issue unlawfully interferes with commerce among the states.⁶ But a gas company engaged in interstate commerce, which is itself not compelled to accept unremunerative prices, cannot complain that the rates

¹ See § 420.

² See § 421.

³ See § 422.

⁴ *Lawrence v. St. Louis-San Francisco Ry. Co.* (1929) 278 U. S. 228, 73 L. Ed. 282, 49 S. Ct. 106; *St. Louis & S. F. Ry. Co. v. Public Service Commission* (1921) 254 U. S. 535, 65 L. Ed. 389, 41 S. Ct. 192; *Union Pac. R. Co. v. Public Service Commission* (1918) 248 U. S. 67, 63 L. Ed. 181, 39 S. Ct. 24; *Michigan Cent. R. Co. v. Railroad Commission* (1915) 236 U. S. 615, 59 L. Ed. 750, 35 S. Ct. 422; *Oregon R. & Nav. Co. v. Campbell* (1913) 230 U. S. 525, 57 L. Ed.

1604, 33 S. Ct. 1026; *The Minnesota Rate Cases* (1913) 230 U. S. 352, 57 L. Ed. 1511, 33 S. Ct. 729; *McNeill v. Southern R. Co.* (1906) 202 U. S. 543, 50 L. Ed. 1142, 26 S. Ct. 722; *Southern Pac. R. Co. v. Railroad Commission* (D. C. N. D. Cal., S. Div., 1935) 10 F. Supp. 918; *Texport Carrier Corp. v. Smith* (D. C. S. D. Tex., Austin Div., 1934) 8 F. Supp. 28.

⁵ *St. Louis & S. F. Ry. Co. v. Public Service Commission* (1921) 254 U. S. 535, 65 L. Ed. 389, 41 S. Ct. 192.

⁶ *Union Pac. R. Co. v. Public Service Commission* (1918) 248 U. S. 67, 63 L. Ed. 181, 39 S. Ct. 24.

prescribed by a state for local companies buying from it burden interstate commerce, even where sale to such companies is its sole business.⁷

§ 421. Impairing the Obligation of Contracts.

Administrative agencies have no power to issue orders which impair or alter the obligations of contracts.⁸ A contract between a city and a carrier amicably settling the question of compensation in the construction of a railroad crossing, which involves no surrender by the city of police power or the right of eminent domain, is valid; and an order of a state commission abrogating its terms impairs the obligation of contract, as well as depriving the carrier of property without due process of law.⁹ Where a gas company's rights to occupy streets and its obligation to supply gas terminated upon the expiration of its franchise, any attempt on the part of a state agency to force a continuation of the service after the expiration of the franchise writes into the company's contract an obligation it did not assume, and has been held to violate the contract clause of the Constitution.¹⁰

An order of a state agency allowing increased rates is not an unconstitutional impairment of a contract made by a private corporation, empowered to become a public service corporation, which soon after changes its status and exercises the power of eminent domain, when the face of the contract and the circumstances show that the change was contemplated, with the result that all the company's contracts would become subject to public regulation.¹¹ A contract the enforcement of which would hamper the state's power reasonably to regulate the construction and use of a railroad crossing is void.¹²

§ 422. Deprivation of the Rights of Free Speech and a Free Press.

An order, as that of the Postmaster General denying second-class mailing privileges, must not deprive of the right of free speech, or destroy the rights of a free press.¹³

⁷Public Utilities Commission v. Landon (1919) 249 U. S. 236, 63 L. Ed. 577, 39 S. Ct. 268.

⁸Union Light, Heat & Power Co. v. Railroad Commission of Commonwealth of Kentucky (D. C. E. D. Ky., 1926) 17 F. (2d) 143.

⁹Missouri, K. & T. R. Co. v. Oklahoma (1926) 271 U. S. 303, 70 L. Ed. 957, 46 S. Ct. 517.

¹⁰Union Light, Heat & Power Co. v. Railroad Commission of Common-

wealth of Kentucky (D. C. E. D. Ky., 1926) 17 F. (2d) 143.

¹¹Ft. Smith Spelter Co. v. Clear Creek Oil & Gas Co. (1925) 267 U. S. 231, 69 L. Ed. 588, 45 S. Ct. 263.

¹²Missouri, K. & T. R. Co. v. Oklahoma (1926) 271 U. S. 303, 70 L. Ed. 957, 46 S. Ct. 517.

¹³United States ex rel. Milwaukee Social Democratic Pub. Co. v. Burleson (1921) 255 U. S. 407, 65 L. Ed. 704, 41 S. Ct. 352.

SUBDIVISION IV

JUDICIAL REVIEW OF ADMINISTRATIVE DECISIONS UPON JUDICIAL QUESTIONS

§ 423. Introduction.

The basic question arising upon judicial review is whether the controversy presents administrative or judicial questions. If they are judicial questions, the complainant may obtain the independent judgment of the reviewing court. If the questions are administrative, the review is rigorously limited by the doctrine of administrative finality.¹ Administrative questions are referred to herein as being for "determination," and judicial questions as being for "decision," to mark their basic differences. Constitutional questions, which present the highest type of judicial question, are treated separately because of the different rules involved.²

In general a judicial question is a question of law, or mixed question of law and fact, affecting private rights, which is for an appropriate court acting judicially to decide in the exercise of its own independent judgment, unaffected by any administrative decision on the particular question, or any administrative consideration. Judicial questions do not fall within the administrative province. They are within the judicial province and in fact form the subject of exercise of judicial power. Due, however, to practical exigencies of procedure, administrative agencies often venture an initial decision upon one or more judicial questions, in order to complete its statutory role. The complexities of present-day administrative procedure tend to involve questions of law more and more.³

Judicial questions include, as a rule, questions respecting the validity of administrative action,⁴ questions of construction, such as construction of administrative findings, reports, orders or regulations,⁵ of statutes,⁶ contracts,⁷ tariffs,⁸ or other documents. Valuation and questions of rate application also involve some judicial questions.⁹

¹ See § 505 et seq.

² See § 261 et seq.

³ See § 73 et seq.

⁴ See § 433 et seq.

⁵ See § 443 et seq.

⁶ See § 449 et seq.

⁷ See § 473 et seq.

⁸ See § 474.

⁹ See § 351.

The construction of a statute presents a judicial question and therefore mere administrative construction thereof is never binding upon a court.¹⁰ It may not even be considered where the statute's meaning is plain on its face and there is no room for construction.¹¹ However, where a statute is ambiguous, a settled administrative construction, acquiesced in by interested parties, if that is possible, is considered by the courts to be of strong persuasive force,¹² and legislative reenactment of an ambiguous statute which has received a settled administrative construction, renders the administrative construction judicially acceptable on the theory that it has received legislative approval.¹³

¹⁰ See §§ 41, 73, 425 et seq.

¹¹ See § 478.

¹² See § 479.

¹³ See § 483.

CHAPTER 26

THE ADMINISTRATIVE FUNCTION AND JUDICIAL QUESTIONS

- § 424. Nature of Judicial Questions.
- § 425. Judicial Questions Always Open for Court Decision.
- § 426. —Apparent Exception: Gratuity Cases.
- § 427. Administrative "Findings" May Contain Either Administrative or Judicial Conclusions.
- § 428. Administrative Considerations Immaterial.
- § 429. Substantial Evidence Rule Inapplicable: Technical Questions and Mixed Questions of Law and Fact.
- § 430. Mixed Questions of Law and Fact.

§ 424. Nature of Judicial Questions.

Judicial questions are questions of law affecting private rights. Questions of law involving the allowance of a bounty or gratuity are not judicial questions inasmuch as they do not affect private rights. Hence they may be and usually are committed, for binding decision, to administrative agents.¹

The function of judicial review is such that it exists only on questions of law affecting private rights, that is, judicial questions, which are necessarily involved in the administrative determination under review.² Those questions of law which pertain to the validity of determinations on administrative matters, which are ordinarily questions of fact, are taken up in the part of this work dealing with administrative questions. These go to compliance with the constitutional and statutory requirements for exercise of delegated legislative powers, and the basic requisites of proof.³

§ 425. Judicial Questions Always Open for Court Decision.

The prime administrative function is the determination of questions of fact, that is, administrative questions. These are within the legislative sphere, and a determination on them by an administrative agency is subject to the rigorous doctrine of administrative finality. As a practical adjunct of the process of determining administrative questions an agency must often, however, venture an initial decision of one or more judicial questions.⁴ But the administrative province

¹ See § 426.

² See §§ 41, 73 et seq.

³ See § 505 et seq.

⁴ See § 73 et seq.

of determining legislative questions of fact as the administrative arm of the legislature, does not extend to the decision of judicial questions. Just as the judgment of a court may not be substituted for that of an administrative agency on an administrative question,⁵ the judgment of an administrative agency may not be substituted for that of a court on a judicial question, and administrative decision of a judicial question ordinarily carries no weight whatever.⁶ Indeed to be valid an administrative scheme must provide for decision by an appropriate court of every judicial question involved.⁷ Under the doctrines of supremacy of law, and the separation of powers prescribed in the Constitution, a binding decision on a judicial question may only be made by an appropriate court acting judicially.⁸ Hence, judicial questions are always open for the independent decision of an appropriate court acting judicially, and the court's judgment must ordinarily be substituted for that of the agency.⁹

⁵ See § 519.

⁶ See § 475 et seq.

⁷ *Anniston Mfg. Co. v. Davis* (1937) 301 U. S. 337, 81 L. Ed. 1143, 57 S. Ct. 816; *A. L. A. Schechter Poultry Corp. v. United States* (1935) 295 U. S. 495, 79 L. Ed. 1570, 55 S. Ct. 837, 97 A. L. R. 947; *Crowell v. Benson* (1932) 285 U. S. 22, 76 L. Ed. 598, 52 S. Ct. 285. See also § 274 et seq.

⁸ See § 41 et seq.

9 Alien Cases.

Lloyd Sabaudo Societa Anonima v. Elting (1932) 287 U. S. 329, 77 L. Ed. 341, 53 S. Ct. 167; *Gegiow v. Uhl* (1915) 239 U. S. 3, 60 L. Ed. 114, 36 S. Ct. 2.

Board of Review (Treasury Department).

Anniston Mfg. Co. v. Davis (1937) 301 U. S. 337, 81 L. Ed. 1143, 57 S. Ct. 816.

Board of Tax Appeals.

Helvering v. Tex-Penn Oil Co. (1937) 300 U. S. 481, 81 L. Ed. 755, 57 S. Ct. 569; *Helvering v. Rankin* (1935) 295 U. S. 123, 74 L. Ed. 1343, 55 S. Ct. 732; *Phillips v. Commissioner of Internal Revenue* (1931) 283 U. S. 589, 75 L. Ed. 1289, 51 S. Ct. 608.

Federal Communications Commission.

* *Federal Communications Commission v. Pottsville Broadcasting Co.* (1940) 309 U. S. 134, 84 L. Ed. 656, 60 S. Ct. 437; * *Rochester Telephone Corp. v. United States* (1939) 307 U. S. 125, 83 L. Ed. 1147, 59 S. Ct. 754.

Interstate Commerce Commission.

Powell v. United States (1937) 300 U. S. 276, 81 L. Ed. 643, 57 S. Ct. 470; *W. P. Brown & Sons Lumber Co. v. Louisville & N. R. Co.* (1937) 299 U. S. 393, 81 L. Ed. 301, 57 S. Ct. 265; *United States v. Los Angeles & S. L. R. Co.* (1927) 273 U. S. 299, 71 L. Ed. 651, 47 S. Ct. 413; *United States v. New York Cent. R. Co.* (1924) 263 U. S. 603, 68 L. Ed. 470, 44 S. Ct. 212; *United States ex rel. Louisville Cement Co. v. Interstate Commerce Commission* (1918) 246 U. S. 638, 62 L. Ed. 914, 38 S. Ct. 408; * *Manufacturers R. Co. v. United States* (1918) 246 U. S. 457, 62 L. Ed. 831, 38 S. Ct. 383; *Kansas City Southern R. Co. v. United States* (1913) 231 U. S. 423, 58 L. Ed. 296, 34 S. Ct. 125.

Secretary of Agriculture.

St. Joseph Stock Yards Co. v. United States (1936) 298 U. S. 38,

The cases just cited are for the most part leading cases stating more or less articulately the fundamental principle that questions of law affecting private rights—judicial questions—are always open for independent decision by an appropriate court acting judicially. Each case in which the court decides, in its own independent judgment, a question previously decided expressly or by implication by an administrative agency, necessarily stamps that question as being judicial rather than administrative. The precise phrase “judicial question,” due to the spotty development of administrative law, is not always used, and the phrase “question of law” frequently appears.¹⁰

Where administrative action has been predicated upon wrongful decision of a judicial question which has not been committed to an administrative agency for initial decision,¹¹ the agency can be restrained from further proceedings based upon the wrongful decision of the judicial question.¹²

When the court has corrected an error of law, the agency is bound, on remand, to act upon the correction.¹³ But correction upon a legal question which is embedded in an administrative question, leaves the agency free to make its own determination upon the administrative question in accordance with the correct legal principles.¹⁴ Where an

80 L. Ed. 1033, 56 S. Ct. 720; *Tagg Bros. & Moorhead v. United States* (1930) 280 U. S. 420, 74 L. Ed. 524, 50 S. Ct. 220; *Chester C. Fosgate Co. v. Kirkland* (D. C. S. D. Fla., 1937) 19 F. Supp. 152.

Secretary of the Interior.

West v. Standard Oil Co. (1929) 278 U. S. 200, 73 L. Ed. 265, 49 S. Ct. 138; *Hawley v. Diller* (1900) 178 U. S. 476, 44 L. Ed. 1157, 20 S. Ct. 986.

State Agencies.

West v. Chesapeake & Potomac Telephone Co. (1935) 295 U. S. 662, 79 L. Ed. 1640, 55 S. Ct. 894; *Minnie v. Port Huron Terminal Co.* (1935) 295 U. S. 647, 79 L. Ed. 1631, 55 S. Ct. 884.

Tariff Commission.

Frischer & Co. v. Bakelite Corp. (1930) 39 F. (2d) 247, cert. den. 282 U. S. 852, 75 L. Ed. 755, 51 S. Ct. 29.

Workmen's Compensation Cases.

* *Crowell v. Benson* (1932) 285 U. S. 22, 76 L. Ed. 598, 52 S. Ct. 285.

Miscellaneous.

American School of Magnetic Healing v. McAnnulty (1902) 187 U. S. 94, 47 L. Ed. 90, 23 S. Ct. 33.

¹⁰ See the cases cited in note 9.

¹¹ See § 226 et seq.

¹² *Perkins v. Elg* (1939) 307 U. S. 325, 83 L. Ed. 1320, 59 S. Ct. 884; *Crowell v. Benson* (1932) 285 U. S. 22, 76 L. Ed. 598, 52 S. Ct. 285. See also §§ 688, 704.

¹³ *Federal Communications Commission v. Pottsville Broadcasting Co.* (1940) 309 U. S. 134, 84 L. Ed. 656, 60 S. Ct. 437.

¹⁴ *Federal Communications Commission v. Pottsville Broadcasting Co.* (1940) 309 U. S. 134, 84 L. Ed. 656, 60 S. Ct. 437. See also §§ 505, 788 et seq.

agency approves a plan upon a condition which it has no legal right to impose, it has been held upon judicial review that the condition is void and that the administrative approval may stand free from the condition. The dissent took the position that this was an intrusion upon the administrative province, and that the case should have been remanded to the agency for redetermination of the question of approval in accordance with the correct legal principles.¹⁵

The fact that a judicial decision on a judicial question, such as the extent of an agency's jurisdiction, must result in determining the character of the decision which the agency must render when the case is returned to it, cannot affect the power of an appropriate court to define what that jurisdiction is under the Act of Congress or the duty of the agency to accept and act upon such definition when announced.¹⁶

§ 426. — Apparent Exception: Gratuity Cases.

An apparent exception to the rule that judicial questions are always open for decision by an appropriate court is found in gratuity cases, where Congress, since it need grant nothing, can condition its grant upon any terms it chooses. The claimant has no legal rights and therefore none may be infringed, no matter what procedure is prescribed.¹⁷ Thus Congress may delegate to an officer or agency discretion to decide the final construction of the statute being executed, which would be a judicial question if private rights were affected. No court in such a case can control, by mandamus or otherwise the administrative interpretation, even if it may think it erroneous. It is conclusive.¹⁸

¹⁵ *United States v. Chicago, M., St. P. & P. R. Co.* (1931) 282 U. S. 311, 75 L. Ed. 359, 51 S. Ct. 159.

¹⁶ *United States ex rel. Louisville Cement Co. v. Interstate Commerce Commission* (1918) 246 U. S. 638, 62 L. Ed. 914, 38 S. Ct. 408.

¹⁷ See § 187 et seq.

¹⁸ *Work v. United States ex rel. Rives* (1925) 267 U. S. 175, 69 L. Ed. 561, 45 S. Ct. 252.

"Under § 204, the Commission exercises functions broader than those customarily conferred upon auditing or disbursing officers. It sits as a special tribunal to hear and deter-

mine the claims presented. Compare *Work v. Rives*, 267 U. S. 175, 182; *Great Northern Ry. Co. v. United States*, 277 U. S. 172, 182. It renders a judgment upon a full hearing. In deciding any one of the enumerated questions of construction, as in other rulings of law or findings of fact, the Commission may err. The victim of the error may be either the carrier or the Government. Although the decision on the question of construction be favorable to the carrier, it may still fail to secure compensation, because there was, in fact, no deficit, whatever meaning be given to that

In the creation of claims against itself the United States is not bound to provide a remedy in the courts. It may withhold all remedy or it may provide an administrative remedy and make it exclusive. But in the absence of compelling language, resort to the courts to assert a right which the statute creates will be deemed to be curtailed only so far as authority to decide is given to the administrative officer.¹⁹

word. On the other hand, an erroneous decision in favor of the carrier, on any of those questions, may result in the issue of a certificate and the payment thereunder of money which should not, and but for the error would not, be made. Since authority to pass upon the meaning of the word 'deficit' and upon each of the other questions of construction, is essential to the performance of the duty imposed upon the Commission, and Congress did not provide a method of review, we hold that it intended to leave the Government, as well as the carrier, remediless whether the error be one of fact or of law. Compare *United States v. Great Northern Ry. Co.*, 287 U. S. 144. The rule declared in *Wisconsin Central R. Co. v. United States*, 164 U. S. 190; *Grand Trunk Western Ry. Co. v. United States*, 252 U. S. 112, is not applicable here. The decision in *Continental Tie & Lumber Co. v. United States*, 286 U. S. 290, is not inconsistent with this view." (Mr. Justice Brandeis in *Butte, A. & P. Ry. Co. v. United States* (1933) 290 U. S. 127, 142, 143, 78 L. Ed. 222, 54 S. Ct. 108.)

¹⁹ "The United States is not, by the creation of claims against itself, bound to provide a remedy in the courts. It may withhold all remedy or it may provide an administrative remedy and make it exclusive, however mistaken its exercise. See *United States v. Babcock*, 250 U. S. 328. But, in the absence of compelling language, resort to the courts to as-

sert a right which the statute creates will be deemed to be curtailed only so far as authority to decide is given to the administrative officer. If the statutory benefit is to be allowed only in his discretion, the courts will not substitute their discretion for his. *Williamsport Wire Rope Co. v. United States*, 277 U. S. 551; *United States v. Atchison, T. & S. F. Ry. Co.*, 249 U. S. 451, 454; *Ness v. Fisher*, 223 U. S. 683. If he is authorized to determine questions of fact his decision must be accepted unless he exceeds his authority by making a determination which is arbitrary or capricious or unsupported by evidence, see *Silberschein v. United States*, 266 U. S. 221, 225; *United States v. Williams*, 278 U. S. 255, 257, 258; *Meadows v. United States*, 281 U. S. 271, 274; *Degge v. Hitchcock*, 229 U. S. 162, 171; or by failing to follow a procedure which satisfies elementary standards of fairness and reasonableness essential to the due conduct of the proceedings which Congress has authorized, *Lloyd Sabaudo Societa v. Elting*, 287 U. S. 329, 330, 331. But the power of the administrative officer will not, in the absence of a plain command, be deemed to extend to the denial of a right which the statute creates, and to which the claimant, upon facts found or admitted by the administrative officer, is entitled. *United States v. Laughlin*, 249 U. S. 440, 443; *United States v. Hvoslef*, *supra*; *McLean v. United States*, *supra*, 378; *Parish v. Mac-*

§ 427. Administrative "Findings" May Contain Either Administrative or Judicial Conclusions.

A judge who tries the facts, or a special master or referee, is under a duty to state findings of fact and conclusions of law separately.²⁰ But administrative "findings" indicated to be findings of fact are often conclusions on judicial questions, that is, conclusions of law, on which a court must substitute its judgment for that of the agency. A conclusion which is contrary to the specific facts found by the agency, and based upon an erroneous construction of a statute, is not an independent finding of fact, but a conclusion of law which a court will overthrow.²¹

§ 428. Administrative Considerations Immaterial.

Administrative considerations, that is, matters of legislative policy or practical considerations which would be entitled to weight by an administrative agency in determining an administrative question, have no bearing whatever on the decision of a judicial question.²² Either the administrative agency has power to make whatever adjustments are required by such considerations in subsequent administrative proceedings, or power remains in the legislature to make whatever change in the laws is required for appropriate disposition of those considerations.²³

§ 429. Substantial Evidence Rule Inapplicable: Technical Questions and Mixed Questions of Law and Fact.

The substantial evidence rule which provides the commonest test of administrative questions under the doctrine of administrative finality, has obviously no application to judicial questions.²⁴ Thus it cannot be contended that an administrative decision of a judicial question is binding on the courts because "supported by substantial evidence," where the judicial question is a pure question of law, or

Veagh, 214 U. S. 124; *Medbury v. United States*, supra, 497, 498; see *Bates & Guild Co. v. Payne*, 194 U. S. 106, 109, 110." (Mr. Justice Stone in *Dismuke v. United States* (1936) 297 U. S. 167, 171, 172, 80 L. Ed. 561, 56 S. Ct. 400.)

²⁰ See § 784.

²¹ *United States v. New York Cent. R. Co.* (1924) 263 U. S. 603, 68 L. Ed. 470, 44 S. Ct. 212.

²² *W. P. Brown & Sons Lumber Co. v. Louisville & N. R. Co.* (1937) 299 U. S. 393, 81 L. Ed. 301, 57 S. Ct. 265.

²³ *W. P. Brown & Sons Lumber Co. v. Louisville & N. R. Co.* (1937) 299 U. S. 393, 81 L. Ed. 301, 57 S. Ct. 265.

²⁴ See § 575 et seq.

a mixed question of law and fact which has been left for judicial decision,²⁵ unless it is a question involving a technical term, whose determination is validly delegated to the agency.²⁶

§ 430. Mixed Questions of Law and Fact.

Ordinarily mixed questions of law and fact are judicial questions for the courts.²⁷ For instance, whether certain trackage is a "spur" is a mixed question of law and fact which has been left by Congress for judicial decision.²⁸

The substantial evidence rule does not apply to administrative decisions on such mixed questions of law and fact.²⁹

Whether an injury occurred upon the navigable waters of the United States is a mixed question of law and fact. Congress, in amending the maritime law so as to impose liability without fault, cannot reach beyond the constitutional limits of admiralty jurisdiction. Waters that are navigable in fact are navigable in law.³⁰ Whether the relationship of master and servant exists, is a mixed question of law and fact in such compensation cases. It is a determination of fact, and that fact is the pivot of the statute, and underlies the constitutionality of the enactment.³¹

²⁵ *United States v. Idaho* (1936) 298 U. S. 105, 80 L. Ed. 1070, 56 S. Ct. 690; *Crowell v. Benson* (1932) 285 U. S. 22, 76 L. Ed. 598, 52 S. Ct. 285.

²⁶ See § 474.

²⁷ *Helvering v. Rankin* (1935) 295 U. S. 123, 79 L. Ed. 1343, 55 S. Ct. 732; *United States v. Idaho* (1936) 298 U. S. 105, 80 L. Ed. 1070, 56 S. Ct. 690.

²⁸ *Interstate Commerce Act* § 1

(20), 49 USCA 1 (20). *United States v. Idaho* (1936) 298 U. S. 105, 80 L. Ed. 1070, 56 S. Ct. 690.

²⁹ *United States v. Idaho* (1936) 298 U. S. 105, 80 L. Ed. 1070, 56 S. Ct. 690.

³⁰ *Crowell v. Benson* (1932) 285 U. S. 22, 76 L. Ed. 598, 52 S. Ct. 285.

³¹ *Crowell v. Benson* (1932) 285 U. S. 22, 76 L. Ed. 598, 52 S. Ct. 285.

See also § 261 et seq.

CHAPTER 27

PARTICULAR JUDICIAL QUESTIONS

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- § 432. Whether Judicial Review Exists.
- § 433. Retroactive Application of Valid Promulgated Rate.

II. QUESTIONS AS TO THE VALIDITY OF ADMINISTRATIVE ACTION

A. Administrative Procedure

- § 434. In General.
- § 435. Composition of Agency.

B. Findings and Orders

- § 436. Findings in General.
- § 437. Whether Findings Support Order.
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- § 456. Extent of Agency's Statutory Duty.
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- § 459. —Questions of Definition or Legal Meaning.
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- § 461. —Questions Concerning Tariffs.
- § 462. Questions Under the Federal Communications Act.
- § 463. Questions Under the Federal Trade Commission Act and Related Statutes.
- § 464. Questions Under the National Labor Relations Act.
- § 465. Questions Under the Railway Labor Act.
- § 466. Questions Under the Packers and Stockyards Act.
- § 467. Questions Under the Postal Laws.
- § 468. Questions Under the Public Land Acts.
- § 469. Questions Under Various Revenue Laws.
- § 470. Questions Under the Tariff Acts.
- § 471. Questions Under Workmen's Compensation Acts.
- § 472. State Statutes.

C. Construction of Documents

- § 473. In General.
- § 474. Construction of Tariffs: May Be Either Judicial or Administrative Questions.

I. IN GENERAL

§ 431. Introduction.

No matter on what ground an attack is based, the general question as to whether certain administrative action is valid is a judicial question.¹ Whether administrative regulations are within the limits of the power to issue them is a judicial question.² While findings of fact made by an agency are conclusive if supported by the evidence, it is a judicial question as to whether there is substantial evidence to support them.³

Whether an agency has jurisdiction over a particular party is a judicial question.⁴ Thus, whether the Interstate Commerce Commission has jurisdiction over part of a Canadian railroad which is in the

¹ Interstate Commerce Commission v. Union Pac. R. Co. (1912) 222 U. S. 541, 56 L. Ed. 308, 32 S. Ct. 108. 142, 65 F. (2d) 488, cert. den. 290 U. S. 647, 78 L. Ed. 561, 54 S. Ct. 64; Interstate Commerce Commission v. United States ex rel. Humboldt S. S. Co. (1912) 224 U. S. 474, 56 L. Ed. 849, 32 S. Ct. 556.

² See § 496.

³ See § 575 et seq.

⁴ Baltimore & O. R. Co. v. Domestic Hardwoods, Inc. (1933) 62 App. D. C.

United States, is a judicial question.⁵ Whether an agency has statutory⁶ or constitutional⁷ power to act, is a judicial question.

§ 432. Whether Judicial Review Exists.

Whether particular administrative action is reviewable in court is a judicial question of prime importance which administrative agencies have no occasion to decide. This may be a question of statutory interpretation,⁸ or a question of constitutional right.⁹

§ 433. Retroactive Application of Valid Promulgated Rate.

Whether an administrative order which ruled that refund of excess collections over a rate promulgated should be retroactively applied to a period prior to the date of promulgation, is valid or not, is a judicial question.¹⁰

II. QUESTIONS AS TO THE VALIDITY OF ADMINISTRATIVE ACTION

A. Administrative Procedure

§ 434. In General.

All questions as to the validity of administrative procedure are judicial questions for the courts, on which administrative decision or

⁵ *Baltimore & O. R. Co. v. Domestic Hardwoods, Inc.* (1933) 62 App. D. C. 142, 65 F. (2d) 488, cert. den. 290 U. S. 647, 78 L. Ed. 561, 54 S. Ct. 64.

⁶ *Federal Communications Commission v. Pottsville Broadcasting Co.* (1940) 309 U. S. 134, 84 L. Ed. 656, 60 S. Ct. 437.

Interstate Commerce Commission v. Louisville & N. R. Co. (1913) 227 U. S. 88, 57 L. Ed. 431, 33 S. Ct. 185; *Southern Pac. Co. v. Interstate Commerce Commission* (1911) 219 U. S. 433, 55 L. Ed. 283, 31 S. Ct. 288; *Interstate Commerce Commission v. Illinois Cent. R. Co.* (1910) 215 U. S. 452, 54 L. Ed. 280, 30 S. Ct. 155.

⁷ *Interstate Commerce Commission v. Louisville & N. R. Co.* (1913) 227 U. S. 88, 57 L. Ed. 431, 33 S. Ct. 185; *Southern Pac. Co. v. Interstate Commerce Commission* (1911) 219 U. S. 433, 55 L. Ed. 283, 31 S. Ct. 288; *Interstate Commerce Commission v. Illinois Cent. R. Co.* (1910) 215 U. S. 452, 54 L. Ed. 280, 30 S. Ct. 155.

⁸ *Interstate Commerce Commission v. Louisville & N. R. Co.* (1913) 227 U. S. 88, 57 L. Ed. 431, 33 S. Ct. 185; *Southern Pac. Co. v. Interstate Commerce Commission* (1911) 219 U. S. 433, 55 L. Ed. 283, 31 S. Ct. 288; *Interstate Commerce Commission v. Illinois Cent. R. Co.* (1910) 215 U. S. 452, 54 L. Ed. 280, 30 S. Ct. 155.

Interstate Commerce Commission v. Illinois Cent. R. Co. (1910) 215 U. S. 452, 54 L. Ed. 280, 30 S. Ct. 155. See also § 261 et seq.

⁹ *Williamsport Wire Rope Co. v. United States* (1928) 277 U. S. 551, 72 L. Ed. 985, 48 S. Ct. 587.

¹⁰ *See Quon Quon Poy v. Johnson* (1927) 273 U. S. 352, 71 L. Ed. 680, 47 S. Ct. 346; *Ohio Valley Water Co. v. Ben Avon Borough* (1920) 253 U. S. 287, 64 L. Ed. 908, 40 S. Ct. 527. See also § 261 et seq.

¹¹ *United Gas Public Service Co. v. Texas* (1938) 303 U. S. 123, 82 L. Ed. 702, 58 S. Ct. 483, rehearing denied 303 U. S. 667, 82 L. Ed. 1124, 58 S. Ct. —.

assertion is of no value.¹¹ Such questions include whether a party is authorized by statute to institute an administrative proceeding,¹² whether Congress authorized the administrative method of proof and of adjudication pursued by the agency,¹³ and whether the taking of judicial notice¹⁴ or exclusion of evidence¹⁵ is proper. Where rights created are merely statutory, however, administrative construction may be accorded great weight. Thus, where the question is whether an ambiguous statute permitted more expeditious procedure to determine the status of an alien seaman than that used for other immigrants, the fact that such procedure was the departmental practice in such cases was held to be of great weight.¹⁶

§ 435. Composition of Agency.

Questions relating to the composition of an agency such as the number constituting a quorum, and the part of the quorum or of the agency which may act with authority for the whole, are judicial questions.¹⁷

B. Findings and Orders

§ 436. Findings in General.

Findings are always required for quasi-judicial and quasi-legislative action in an adversary proceeding involving particular parties.¹⁸ Findings are not required for quasi-legislative action which is of general application rather than for specific application in a particular case.¹⁹

¹¹ *Morgan v. United States* (1936) 298 U. S. 468, 80 L. Ed. 1288, 56 S. Ct. 906; *Shields v. Utah Idaho C. R. Co.* (1938) 305 U. S. 177, 83 L. Ed. 111, 59 S. Ct. 160.

¹² *Interstate Commerce Commission v. Delaware, L. & W. R. Co.* (1910) 216 U. S. 531, 54 L. Ed. 605, 30 S. Ct. 415.

¹³ *The New England Divisions Case* (1923) 261 U. S. 184, 67 L. Ed. 605, 43 S. Ct. 270.

¹⁴ *Ohio Bell Telephone Co. v. Public Utilities Commission* (1937) 301 U. S. 292, 81 L. Ed. 1093, 57 S. Ct. 724; *Strecker v. Kessler* (C. C. A. 5th,

1938) 95 F. (2d) 976; *Atchison, T. & S. F. R. Co. v. United States* (1932) 284 U. S. 248, 76 L. Ed. 273, 52 S. Ct. 146. See also § 765.

¹⁵ See §§ 246, 696.

¹⁶ *Lloyd Royal Belge Societe Anonyme v. Elting* (C. C. A. 2d, 1932) 61 F. (2d) 745, cert. den. 289 U. S. 730, 77 L. Ed. 1479, 53 S. Ct. 526. See also § 475 et seq.

¹⁷ *Frischer & Co. v. Bakelite Corp.* (Ct. of Cust. & Pat. App., 1930) 39 F. (2d) 247, cert. den. 282 U. S. 852, 75 L. Ed. 755, 51 S. Ct. 29.

¹⁸ See § 550 et seq.

¹⁹ See § 554.

Whether a statute requires particular findings to support an administrative order, is a judicial question.²⁰

Whether a finding is supported by substantial evidence is a judicial question.²¹

Whether circumstantial facts found by an agency justify in legal effect a finding on an administrative question, is a judicial question.²² Thus whether a practice which has been found to exist, may as a matter of law constitute undue discrimination, under the Interstate Commerce Act, is a judicial question.²³ The substance of this rule is that the legal meaning of each word is its grammatical or statutory meaning. The words of a legislative standard laid down by Congress may not be distorted beyond their grammatical or statutory meaning, even if they are not words of particular legal significance. Words must be truthfully and accurately used if administrative schemes are to be administered in an orderly fashion.²⁴ Otherwise, by the insincere use of words power delegated to an administrative agency may be exercised as if unlimited in scope. Inaccurate labels for findings should never be tolerated because of the great abuses possible.

The "findings" of an agency are for the most part findings of purely legislative facts, sprinkled with conclusions of law.²⁵ A conclusion which is contrary to the specific facts found by the agency, and based upon an erroneous construction of a statute, is not an inde-

²⁰ *United States v. Baltimore & O. R. Co.* (1935) 293 U. S. 454, 79 L. Ed. 587, 55 S. Ct. 268; *Wichita Railroad & Light Co. v. Public Utilities Commission* (1922) 260 U. S. 48, 67 L. Ed. 124, 43 S. Ct. 51. See *Crowell v. Benson* (1932) 285 U. S. 22, 76 L. Ed. 598, 52 S. Ct. 285.

²¹ *Federal Trade Commission*.

See *Federal Trade Commission v. Pacific States Paper Trade Ass'n* (1927) 273 U. S. 52, 71 L. Ed. 534, 47 S. Ct. 255. See also § 575 et seq.

Interstate Commerce Commission.

United States v. Louisville & N. R. Co. (1914) 235 U. S. 314, 59 L. Ed. 245, 35 S. Ct. 113; **Florida E. C. R. Co. v. United States* (1914) 234 U. S. 167, 58 L. Ed. 1267, 34 S. Ct. 867; *Interstate Commerce Commission v. Louisville & N. R. Co.* (1913) 227 U. S. 88, 57 L. Ed. 431, 33 S. Ct. 185.

National Labor Relations Board.

Consolidated Edison Co. v. National Labor Relations Board (1938) 305 U. S. 197, 83 L. Ed. 126, 59 S. Ct. 206; *National Labor Relations Board v. Boss Mfg. Co.* (C. C. A. 7th, 1939) 107 F. (2d) 574.

²² *Louisville & N. R. Co. v. United States* (1916) 242 U. S. 60, 61 L. Ed. 152, 37 S. Ct. 61; *Interstate Commerce Commission v. Diffenbaugh* (1911) 222 U. S. 42, 56 L. Ed. 83, 32 S. Ct. 22.

²³ *Louisville & N. R. Co. v. United States* (1916) 242 U. S. 60, 61 L. Ed. 152, 37 S. Ct. 61; *Interstate Commerce Commission v. Diffenbaugh* (1911) 222 U. S. 42, 56 L. Ed. 83, 32 S. Ct. 22.

²⁴ See §§ 564-566.

²⁵ See § 553.

pendent finding of fact, but a conclusion of law which a court will overthrow.²⁶ It is a judicial question whether as a matter of law the circumstantial facts found are adequate to support any "findings" which are in the nature of conclusions of law,²⁷ or conversely whether the correct rule of law has been applied to the facts found.²⁸

§ 437. Whether Findings Support Order.

Just as a judgment or decree in a judicial proceeding must have legal support in findings of fact and conclusions of law, and just as a complaint for judicial relief will be dismissed if it fails to state facts sufficient to constitute a cause of action, or restated, a claim upon which relief can be granted²⁹ so an administrative order must be supported by findings of fact which furnish a legal basis for the sanction contained in the order. The administrative direction must be legally appropriate for the facts found.³⁰ If not, the order of an

²⁶ *United States v. New York Cent. R. Co.* (1924) 263 U. S. 603, 68 L. Ed. 470, 44 S. Ct. 212. See also § 553.

²⁷ *Great Northern R. Co. v. Minnesota ex rel. Railroad & Warehouse Commission* (1915) 238 U. S. 340, 59 L. Ed. 1337, 35 S. Ct. 753; *Interstate Commerce Commission v. Louisville & N. R. Co.* (1913) 227 U. S. 88, 57 L. Ed. 431, 33 S. Ct. 185. See *Helvering v. F. & R. Lazarus & Co.* (1939) 308 U. S. 252, 84 L. Ed. 226, 60 S. Ct. 209.

²⁸ *General Utilities & Operating Co. v. Helvering* (1935) 296 U. S. 200, 80 L. Ed. 154, 56 S. Ct. 185.

²⁹ See Rule 12 of the Federal Rules of Civil Procedure.

³⁰ *Board of Review.*

Anniston Mfg. Co. v. Davis (1937) 301 U. S. 337, 81 L. Ed. 1143, 57 S. Ct. 816.

Federal Trade Commission.

Federal Trade Commission v. Pacific States Paper Trade Ass'n (1927) 273 U. S. 52, 71 L. Ed. 534, 47 S. Ct. 255; *Federal Trade Commission v. Curtis Pub. Co.* (1923) 260 U. S. 568, 67 L. Ed. 408, 43 S. Ct. 210; *Federal Trade Commission v. Wallace* (C. C. A. 8th, 1935) 75 F. (2d) 733.

Interstate Commerce Commission.

Atlantic Coast Line R. Co. v. Florida (1935) 295 U. S. 301, 79 L. Ed. 1451, 55 S. Ct. 713; *Atchison, T. & S. F. Ry. Co. v. United States* (1935) 295 U. S. 193, 79 L. Ed. 1382, 55 S. Ct. 748; *Illinois Commerce Commission v. United States* (1934) 292 U. S. 474, 78 L. Ed. 1371, 54 S. Ct. 783; *Louisville & N. R. Co. v. United States* (1915) 238 U. S. 1, 59 L. Ed. 1177, 35 S. Ct. 696; *Interstate Commerce Commission v. Louisville & N. R. Co.* (1913) 227 U. S. 88, 57 L. Ed. 431, 33 S. Ct. 185; *Commonwealth of Kentucky v. United States* (D. C. W. D. Ky., 1933) 3 F. Supp. 778.

National Labor Relations Board.

National Labor Relations Board v. Newport News Shipbuilding & Dry Dock Co. (1939) 308 U. S. 241, 84 L. Ed. 219, 60 S. Ct. 203.

Secretary of the Treasury.

Morgenthau v. Mifflin Chemical Corp. (C. C. A. 3d, 1937) 93 F. (2d) 82, rehearing denied (1938) 94 F. (2d) 550.

Securities and Exchange Commission.

Oklahoma-Texas Trust v. Securities & Exchange Commission (C. C. A. 10th, 1939) 100 F. (2d) 888.

administrative agency, that is to say, its judgment, does not conform to its conclusions on the facts.³¹ This rule applies where the administrative sanction takes the form of refusal to act.³²

Even if the agency's order is based on an erroneous rule of law, if the findings of fact, governed by the correct rule of law, were sufficient to sustain it, the order must be upheld.³³ A valid finding of violation of the Interstate Commerce Act is sufficient to support or form a legal basis for the issuance of a cease and desist order.³⁴

§ 438. — Where Administrative Sanction Not Prescribed in Terms by Statute.

Where an agency is given discretionary authority to direct such affirmative action to be taken as will effectuate "the policies" of an act,³⁵ or to "prevent persons . . . from using unfair methods of competition . . . and unfair or deceptive acts or practices . . .,"³⁶ or otherwise make a direction not specifically provided in terms by statute, the question whether particular affirmative action conceived by an agency and directed to be taken, which is not specifically set forth in the act itself, is legally appropriate for the facts found, is similarly a judicial question. It is, however, broader in scope than in the orthodox case where the administrative sanction is mere repetition of a legislative mandate set forth in terms in the statute. It calls for judicial consideration as to whether the direction is reasonably adapted to the situation which calls for redress in the light of the policies of the act and established principles of law.³⁷

For a discretionary administrative order prescribing "affirmative relief" to be valid, the particular affirmative command made must be

³¹ *Chicago, R. I. & P. R. Co. v. United States* (1931) 284 U. S. 80, 76 L. Ed. 177, 52 S. Ct. 87.

³² *Alton R. Co. v. United States* (1932) 287 U. S. 229, 77 L. Ed. 275, 53 S. Ct. 124.

³³ "But even if the Board's decision had been based on an erroneous rule of law, that would not have justified its reversal, if the findings of fact, governed by the correct rule of law, were sufficient to sustain the decision and had substantial support in the evidence." (Mr. Justice Brandeis in *Helvering v. Rankin* (1935) 295 U. S. 123, 132, 133, 79 L. Ed. 1343, 55 S. Ct. 732.)

³⁴ *United States v. American Sheet & Tin Plate Co.* (1937) 301 U. S. 420, 81 L. Ed. 1186, 57 S. Ct. 804.

³⁵ *The National Labor Relations Act*, 29 USCA 151, 160(c); and the *Agricultural Adjustment Act of 1937*, 7 USCA 601, 608.

³⁶ *The Federal Trade Commission Act*, 15 USCA 45 (a).

³⁷ *Federal Trade Commission*.

Federal Trade Commission v. Royal Milling Co. (1933) 288 U. S. 212, 77 L. Ed. 706, 53 S. Ct. 335; *Lighthouse Rug Co. v. Federal Trade Commission* (C. C. A. 7th, 1929) 35 F. (2d) 163; *Procter & Gamble Co. v. Federal Trade Commission* (C. C. A. 6th, 1926) 11 F. (2d) 47, cert. den. 273

supported by an intent in the act itself, as shown by its language and history, to accomplish that purpose, must be within the act's terms, and must have adequate support, as a matter of law, in the findings, which must in turn be supported by substantial evidence.³⁸ Such statutory provisions, within these legal limits, give to an agency scope for the exercise of judgment and discretion in determining, upon the basis of the findings, whether the case is one requiring an affirmative order, and in choosing the particular affirmative relief to be ordered.³⁹ Judicial questions thus include the legal appropriateness of "back

U. S. 717, 718, 71 L. Ed. 856, 47 S. Ct. 106. See *J. W. Kobi Co. v. Federal Trade Commission* (C. C. A. 2d, 1927) 23 F. (2d) 41.

Interstate Commerce Commission.

Cincinnati, H. & D. R. Co. v. Interstate Commerce Commission (1907) 206 U. S. 142, 51 L. Ed. 995, 27 S. Ct. 648; *Montana v. United States* (D. C. Mont., 1933) 2 F. Supp. 448; *aff'd per curiam* 290 U. S. 593, 78 L. Ed. 523, 54 S. Ct. 125.

National Labor Relations Board.

National Labor Relations Board v. Fansteel Metallurgical Corp. (1939) 306 U. S. 240, 83 L. Ed. 627, 59 S. Ct. 490, 123 A. L. R. 599; **Consolidated Edison Co. v. National Labor Relations Board* (1938) 305 U. S. 197, 83 L. Ed. 126, 59 S. Ct. 206; *National Labor Relations Board v. Mackay Radio & Telegraph Co.* (1938) 304 U. S. 333, 82 L. Ed. 1381, 58 S. Ct. 904; **National Labor Relations Board v. Pennsylvania Greyhound Lines* (1938) 303 U. S. 261, 82 L. Ed. 831, 58 S. Ct. 571, 115 A. L. R. 307; **National Labor Relations Board v. Jones & Laughlin Steel Corp.* (1937) 301 U. S. 1, 81 L. Ed. 893, 57 S. Ct. 615, 108 A. L. R. 1352; *National Labor Relations Board v. Swift & Co.* (C. C. A. 7th, 1940) 108 F. (2d) 988; *National Labor Relations Board v. H. E. Fletcher Co.* (C. C. A. 1st, 1939) 108 F. (2d) 459; *National Labor Rela-*

tions Board v. Remington Rand, Inc. (C. C. A. 2d, 1938) 94 F. (2d) 862; *Mooreville Cotton Mills v. National Labor Relations Board* (C. C. A. 4th, 1938) 94 F. (2d) 61.

Secretary of Agriculture.

United States v. Rock Royal Cooperative, Inc. (1939) 307 U. S. 533, 83 L. Ed. 1446, 59 S. Ct. 993.

State Agencies.

Great Northern R. Co. v. Minnesota ex rel. Railroad & Warehouse Commission (1915) 238 U. S. 340, 59 L. Ed. 1337, 35 S. Ct. 753.

³⁸ *National Labor Relations Board v. Pennsylvania Greyhound Lines, Inc.* (1938) 303 U. S. 261, 82 L. Ed. 831, 58 S. Ct. 571, 115 A. L. R. 307; *Consolidated Edison Co. v. National Labor Relations Board* (1938) 305 U. S. 197, 83 L. Ed. 126, 59 S. Ct. 206.

"The authority to require affirmative action to 'effectuate the policies' of the Act is broad but it is not unlimited. It has the essential limitations which inhere in the very policies of the Act which the Board invokes." (Mr. Chief Justice Hughes in *National Labor Relations Board v. Fansteel Metallurgical Corp.* (1939) 306 U. S. 240, 257, 83 L. Ed. 627, 59 S. Ct. 490, 123 A. L. R. 599.)

³⁹ *National Labor Relations Board v. Pennsylvania Greyhound Lines, Inc.* (1938) 303 U. S. 261, 82 L. Ed. 831, 58 S. Ct. 571, 115 A. L. R. 307.

pay''⁴⁰ and reinstatement orders,⁴¹ orders directing a company to withdraw its recognition from a union,⁴² or to cease giving effect to a contract with a union.⁴³

Where relabeling of the product would suffice, an agency may not order a change of the company's name, by which it is well-known.⁴⁴ Where labeling soap products "naphtha" is a method of unfair competition, the remedy is to require a certain amount of naphtha to be put into the soap at the time of manufacture, naphtha being so volatile that an order requiring its presence in a certain amount when the soap is delivered to the consumer is impossible of performance. Such an order will not, therefore, be upheld.⁴⁵ In such cases, the court may remand to the agency for further proceedings.⁴⁶

§ 439. — — Administrative Sanction Valid Where Equivalent of Judicial Sanction.

Certain facts, found by courts, entitle parties to certain legal relief and remedies. Thus if establishment of certain facts in court entitles one to a particular remedy, or sanction, a like factual showing in an administrative proceeding entitles one to a like remedy or sanction, even though so far as the administrative proceeding is concerned the remedy or sanction is legislative and not judicial.⁴⁷

⁴⁰ National Labor Relations Board v. Jones & Laughlin Steel Corp. (1937) 301 U. S. 1, 81 L. Ed. 893, 57 S. Ct. 615, 108 A. L. R. 1352.

⁴¹ Consolidated Edison Co. v. National Labor Relations Board (1938) 305 U. S. 197, 83 L. Ed. 126, 59 S. Ct. 206; National Labor Relations Board v. Biles Coleman Lumber Co. (C. C. A. 9th, 1938) 98 F. (2d) 18; * National Labor Relations Board v. Remington Rand, Inc. (C. C. A. 2d, 1938) 94 F. (2d) 862.

⁴² Consolidated Edison Co. v. National Labor Relations Board (1938) 305 U. S. 197, 83 L. Ed. 126, 59 S. Ct. 206; National Labor Relations Board v. Pennsylvania Greyhound Lines, Inc. (1938) 303 U. S. 261, 82 L. Ed. 831, 58 S. Ct. 571, 115 A. L. R. 307.

⁴³ Consolidated Edison Co. v. National Labor Relations Board (1938) 305 U. S. 197, 83 L. Ed. 126, 59 S. Ct. 206.

⁴⁴ Federal Trade Commission v. Royal Milling Co. (1933) 288 U. S. 212, 77 L. Ed. 706, 53 S. Ct. 335.

⁴⁵ Procter & Gamble Co. v. Federal Trade Commission (C. C. A. 6th, 1926) 11 F. (2d) 47, cert. den. 273 U. S. 717, 718, 71 L. Ed. 856, 47 S. Ct. 106.

⁴⁶ Federal Trade Commission v. Royal Milling Co. (1933) 288 U. S. 212, 77 L. Ed. 706, 53 S. Ct. 335.

⁴⁷ National Labor Relations Board v. Jones & Laughlin Steel Corp. (1937) 301 U. S. 1, 81 L. Ed. 893, 57 L. Ct. 334, 108 A. L. R. 1352.

§ 440. — — Validity of Conditions Imposed.

Whether an agency may impose a particular condition to be met before an administrative direction may become effective, is a judicial question.⁴⁸

§ 441. — — Permissive Orders.

Judicial questions include whether an agency may make an order permissive instead of mandatory,⁴⁹ and whether a mandatory order is valid which is to become effective only if action is taken under a permissive order.⁵⁰ Whether, before making a permissive order, an agency should consider the powers of the corporation to which it applies, is a judicial question.⁵¹

§ 442. Whether Terms of Order Are Reasonably Clear.

Whether an administrative order is sufficiently detailed in its terms to be valid, as, for instance, whether a back-pay order should list the names of employees and the amounts due to each, is a judicial question.⁵² Likewise whether a clerical error or omission in an order is of such nature as to render the order void is a judicial question, such errors and omissions not being fatal if, by reference to other parts of the record, the meaning is clear.⁵³

III. CONSTRUCTION QUESTIONS

A. Construction of Administrative Writings

§ 443. Administrative Construction of Agency's Writings Ordinarily Accepted.

Administrative documents, that is, reports, orders, findings, certificates, rules and regulations, and others, unlike statutes which are

⁴⁸ Federal Communications Commission.

Crosley Corp. v. Federal Communications Commission (1939) 70 App. D. C. 312, 106 F. (2d) 833.

Interstate Commerce Commission.

* United States v. Lowden (1939) 308 U. S. 225, 84 L. Ed. 208, 60 S. Ct. 248; New York Central Securities Corp. v. United States (1932) 287 U. S. 12, 77 L. Ed. 138, 53 S. Ct. 45; United States v. Chicago, M., St. P. & P. R. Co. (1931) 282 U. S. 311, 75 L. Ed. 359, 51 S. Ct. 159.

⁴⁹ United States v. Louisiana

(1933) 290 U. S. 70, 78 L. Ed. 181, 54 S. Ct. 28.

⁵⁰ United States v. Louisiana (1933) 290 U. S. 70, 78 L. Ed. 181, 54 S. Ct. 28.

⁵¹ New York Central Securities Corp. v. United States (1932) 287 U. S. 12, 77 L. Ed. 138, 53 S. Ct. 45.

⁵² National Labor Relations Board v. Carlisle Lumber Co. (C. C. A. 9th, 1938) 99 F. (2d) 533, cert. den. 306 U. S. 646, 83 L. Ed. 1045, 59 S. Ct. 586. See also § 443 et seq.

⁵³ Smith v. Commissioner of Internal Revenue (C. C. A. 4th 1933) 67 F. (2d) 167. See also § 443 et seq.

creatures of the legislature itself, are the product only of an administrative arm of the legislature acting within an area prescribed and limited by statute. Although an administrative agency has no absolute power to construe a statute or legal document, it is obviously the best source of interpretation of its own writings. Thus the courts will ordinarily accept an agency's construction of its report or order,⁵⁴ or regulation,⁵⁵ or rule.⁵⁶ The author of a document is ordinarily the authoritative interpreter of its purposes.⁵⁷ And it is imperative that an administrative construction of a technical term within the administrative province, which is contained in an agency's document, be final.⁵⁸ It is provided by statute that the National Railroad Adjustment Board, upon request of either party to a proceeding, shall "interpret" its award.⁵⁹

However, compelling circumstances may cause a reviewing court not to consider an administrative construction binding,⁶⁰ and an agency's construction of its own writing has been said to be of great weight only.⁶¹ In construing the rules of the Senate the court must give great weight to the Senate's present construction of the rules, but is not concluded by it.⁶² The construction of the Senate's rules by the Executive Department of the government carries little, if any, weight.⁶³ In any event, to be accepted by the courts an agency's con-

54 Interstate Commerce Commission.

Texas v. United States (1934) 292 U. S. 522, 78 L. Ed. 1402, 54 S. Ct. 819; *George Allison & Co. v. Interstate Commerce Commission* (1939) 70 App. D. C. 375, 107 F. (2d) 180, cert. den. 309 U. S. 656, 84 L. Ed. 1005, 60 S. Ct. 470.

Secretary of Agriculture.

Green Valley Creamery, Inc. v. United States (C. C. A. 1st, 1939) 108 F. (2d) 342.

State Agencies.

Asbury Truck Co. v. Railroad Commission (D. C. S. D. Cal., C. Div., 1931) 52 F. (2d) 263, aff'd 287 U. S. 570, 77 L. Ed. 501, 53 S. Ct. 94.

55 American Telephone & Telegraph Co. v. United States (1936) 299 U. S. 232, 81 L. Ed. 142, 57 S. Ct. 170; *Lowden v. Iroquois Coal Co.* (D. C. N. D. Ill., E. Div., 1937) 18 F. Supp. 923 (ICC).

56 Federal Communications Commission v. Pottsville Broadcasting Co.

(1940) 309 U. S. 134, 84 L. Ed. 656, 60 S. Ct. 437. Compare *United States v. Smith* (1932) 286 U. S. 6, 76 L. Ed. 954, 52 S. Ct. 475 (Rules of U. S. Senate).

57 Federal Communications Commission v. Pottsville Broadcasting Co. (1940) 309 U. S. 134, 84 L. Ed. 656, 60 S. Ct. 437.

58 Green Valley Creamery, Inc. v. United States (C. C. A. 1st, 1939) 108 F. (2d) 342.

59 45 USCA 153 (m).

60 United States v. Smith (1932) 286 U. S. 6, 76 L. Ed. 954, 52 S. Ct. 475 (Rules of U. S. Senate).

61 Froeber-Norfleet, Inc. v. Southern Ry. Co. (D. C. N. D. Ga., 1934) 9 F. Supp. 409.

62 United States v. Smith (1932) 286 U. S. 6, 76 L. Ed. 954, 52 S. Ct. 475.

63 United States v. Smith (1932) 286 U. S. 6, 76 L. Ed. 954, 52 S. Ct. 475.

struction of its own writing should be a reasonable construction, to the end that the implicit requirement that words be truthfully and accurately used be maintained.⁶⁴

An administrative construction of an administrative document is binding upon the agency in its future dealings with the parties involved, and must be read into the document as supplementary thereto.⁶⁵

The reports and orders of an agency ordinarily constitute the only authoritative evidence of its action.⁶⁶ And an administrative construction is usually evidenced by statements in the agency's report or opinion. It may also be evidenced by testimony of witnesses appearing in a judicial proceeding on behalf of an administrative agency,⁶⁷ and by statements in briefs or argument of counsel appearing on its behalf.⁶⁸

§ 444. Administrative Documents to Be Construed by Courts in Absence of Administrative Construction.

To the extent that they have not been interpreted by the agency which wrote them, it is clearly for the courts to construe administrative regulations,⁶⁹ rules,⁷⁰ or miscellaneous documents such as re-

⁶⁴ See § 566.

⁶⁵ *American Telephone & Telegraph Co. v. United States* (1936) 299 U. S. 232, 81 L. Ed. 142, 57 S. Ct. 170.

⁶⁶ *Illinois Cent. R. Co. v. Public Utilities Commission* (1918) 245 U. S. 493, 62 L. Ed. 425, 38 S. Ct. 170.

⁶⁷ *American Telephone & Telegraph Co. v. United States* (1936) 299 U. S. 232, 81 L. Ed. 142, 57 S. Ct. 170.

⁶⁸ *American Telephone & Telegraph Co. v. United States* (1936) 299 U. S. 232, 81 L. Ed. 142, 57 S. Ct. 170.

⁶⁹ *Board of Tax Appeals.*

Helvering v. Fried (1936) 299 U. S. 175, 81 L. Ed. 104, 57 S. Ct. 150; *Schafer v. Helvering* (1936) 299 U. S. 171, 81 L. Ed. 101, 57 S. Ct. 148; *United States v. Safety Car Heating & Lighting Co.* (1936) 297 U. S. 88, 80 L. Ed. 500, 56 S. Ct. 353; *Helvering v. Rankin* (1935) 295 U. S. 123,

79 L. Ed. 1343, 55 S. Ct. 732; *Ramsey v. Commissioner of Internal Revenue* (C. C. A. 10th, 1933) 66 F. (2d) 316, cert. den. 290 U. S. 673, 78 L. Ed. 581, 54 S. Ct. 91; *International Banding Machine Co. v. Commissioner of Internal Revenue* (C. C. A. 2d, 1930) 37 F. (2d) 660.

Interstate Commerce Commission.

Chicago, I. & L. R. Co. v. International Milling Co. (C. C. A. 8th, 1930) 43 F. (2d) 93, cert. den. 282 U. S. 885, 75 L. Ed. 781, 51 S. Ct. 89; *Froeber-Norfleet, Inc. v. Southern Ry. Co.* (D. C. N. D. Ga., 1934) 9 F. Supp. 409.

Securities and Exchange Commission.

Securities & Exchange Commission v. Torr (D. C. S. D. N. Y., 1936) 15 F. Supp. 144.

⁷⁰ *United States v. Abilene & S. Ry. Co.* (1924) 265 U. S. 274, 68 L. Ed. 1016, 44 S. Ct. 565.

ports or opinions, orders, and certificates,⁷¹ including the question whether they are to be liberally construed,⁷² or are permissive or mandatory,⁷³ and other questions as to their legal effect.⁷⁴ For in-

71 Alien Cases.

Restivo v. Clark (C. C. A. 1st, 1937) 90 F. (2d) 847.

Federal Trade Commission.

Federal Trade Commission v. Pure Silk Hosiery Mills (C. C. A. 7th, 1925) 3 F. (2d) 105.

Interstate Commerce Commission.

Baltimore & O. R. Co. v. United States (1938) 304 U. S. 58, 82 L. Ed. 1148, 58 S. Ct. 767; *Illinois Commerce Commission v. United States* (1934) 292 U. S. 474, 78 L. Ed. 1371, 54 S. Ct. 783; *Atlantic Coast Line R. Co. v. United States* (1932) 284 U. S. 288, 76 L. Ed. 298, 52 S. Ct. 171; *United States v. Chicago, M., St. P. & P. R. Co.* (1931) 282 U. S. 311, 75 L. Ed. 359, 51 S. Ct. 159; *St. Louis & O'Fallon R. Co. v. United States* (1929) 279 U. S. 461, 73 L. Ed. 798, 49 S. Ct. 384; *Central N. E. R. v. Boston & A. R. Co.* (1929) 279 U. S. 415, 73 L. Ed. 770, 49 S. Ct. 358; *Arkansas Railroad Commission v. Chicago, R. I. & P. R. Co.* (1927) 274 U. S. 597, 71 L. Ed. 1221, 47 S. Ct. 724; *Minneapolis & St. L. R. Co. v. Peoria & Pekin U. R. Co.* (1926) 270 U. S. 580, 70 L. Ed. 743, 46 S. Ct. 402; *New York Cent. R. Co. v. United States* (1924) 265 U. S. 41, 68 L. Ed. 892, 44 S. Ct. 436; *Dayton-Goose Creek R. Co. v. United States* (1924) 263 U. S. 456, 68 L. Ed. 388, 44 S. Ct. 169, 33 A. L. R. 472; *Skinner & Eddy Corp. v. United States* (1919) 249 U. S. 557, 63 L. Ed. 772, 39 S. Ct. 375; *Manufacturers R. Co. v. United States* (1918) 246 U. S. 457, 62 L. Ed. 831, 38 S. Ct. 383; *American Express Co. v. South Dakota ex rel. Caldwell* (1917) 244 U. S. 617, 61 L. Ed. 1352, 37 S. Ct. 656; *Louisville & N. R. Co.*

v. United States (1915) 238 U. S. 1, 59 L. Ed. 1177, 35 S. Ct. 696; *Pennsylvania Co. v. United States* (1915) 236 U. S. 351, 59 L. Ed. 616, 35 S. Ct. 370; *Interstate Commerce Commission v. Chicago, B. & Q. R. Co.* (1902) 186 U. S. 320, 46 L. Ed. 1182, 22 S. Ct. 824; *El Paso & S. W. R. Co. v. Phelps-Dodge Mercantile Co.* (C. C. A. 9th, 1935) 75 F. (2d) 873; *Eagle Cotton Oil Co. v. Southern R. Co.* (C. C. A. 5th, 1931) 51 F. (2d) 443, cert. den. 284 U. S. 675, 76 L. Ed. 571, 52 S. Ct. 130; *Delaware & Hudson Co. v. United States* (D. C. S. D. N. Y., 1925) 5 F. (2d) 831; *Gulf, M. & N. R. Co. v. Illinois Cent. R. Co.* (D. C. W. D. Tenn., E. Div., 1937) 21 F. Supp. 282, appeal dismissed (C. C. A. 6th, 1940) 109 F. (2d) 1016; *Commonwealth of Kentucky v. United States* (D. C. W. D. Ky., 1933) 3 F. Supp. 778.

National Labor Relations Board.

Consolidated Edison Co. v. National Labor Relations Board (1935) 305 U. S. 197, 83 L. Ed. 126, 59 S. Ct. 206; *National Labor Relations Board v. National Motor Bearing Co.* (C. C. A. 9th, 1939) 105 F. (2d) 652.

State Agencies.

Railroad Commission of California v. Pacific Gas & Electric Co. (1938) 302 U. S. 388, 82 L. Ed. 319, 58 S. Ct. 334; *Illinois Cent. R. Co. v. Public Utilities Commission* (1918) 245 U. S. 493, 62 L. Ed. 425, 38 S. Ct. 170.

⁷² *New York Cent. R. Co. v. United States* (1924) 265 U. S. 41, 68 L. Ed. 892, 44 S. Ct. 436.

⁷³ *New York Central Securities Corp. v. United States* (1932) 287 U. S. 12, 77 L. Ed. 138, 53 S. Ct. 45.

⁷⁴ *Restivo v. Clark* (C. C. A. 1st, 1937) 90 F. (2d) 847 (alien case);

stance, whether an order of the Interstate Commerce Commission, authorizing a general upward revision or adjustment of rates is to be construed as merely giving approval to, or as prescribing particular rates, is a judicial question.⁷⁵ Whether a particular administrative direction under attack is a new order or merely an amendment of an old one is a judicial question.⁷⁶ When an administrative order becomes effective is a judicial question.⁷⁷ Whether a company to which a cease and desist order was directed has complied with the order is a judicial question.⁷⁸

What an agency finds appears by its opinion or report. A reviewing court is bound to go to that opinion or report to ascertain the agency's findings,⁷⁹ and should consider all related findings and the agency's report or opinion as a whole.⁸⁰

§ 445. Construction Upon Which Order Can Be Upheld Will Be Adopted Where Possible.

Just as courts will attribute to an ambiguous statute a construction which will render it constitutional rather than one which will render

El Paso & S. W. R. Co. v. Phelps-Dodge Mercantile Co. (C. C. A. 9th, 1935) 75 F. (2d) 873 (ICC).

⁷⁵ Eagle Cotton Oil Co. v. Southern Ry. Co. (C. C. A. 5th, 1931) 51 F. (2d) 443, cert. den. 284 U. S. 675, 76 L. Ed. 571, 52 S. Ct. 130.

⁷⁶ Delaware & Hudson Co. v. United States (D. C. S. D. N. Y., 1925) 5 F. (2d) 831.

⁷⁷ United States v. Baltimore & O. R. Co. (1931) 284 U. S. 195, 76 L. Ed. 243, 52 S. Ct. 109; Delaware & Hudson Co. v. United States (D. C. S. D. N. Y., 1925) 5 F. (2d) 831.

⁷⁸ Federal Trade Commission v. Pure Silk Hosiery Mills, Inc. (C. C. A. 7th, 1925) 3 F. (2d) 105.

⁷⁹ Interstate Commerce Commission.

United States v. Baltimore & O. R. Co. (1935) 293 U. S. 454, 79 L. Ed. 587, 55 S. Ct. 268; Illinois Commerce Commission v. United States (1934) 292 U. S. 474, 78 L. Ed. 1371, 54 S. Ct. 783; Skinner & Eddy Corp. v. United States (1919) 249 U. S. 557, 63 L. Ed. 772, 39 S. Ct. 375; Interstate Commerce Commission v. Chi-

cago, B. & Q. R. Co. (1902) 186 U. S. 320, 46 L. Ed. 1182, 22 S. Ct. 824.

State Agencies.

* Railroad Commission of California v. Pacific Gas & Electric Co. (1938) 302 U. S. 388, 82 L. Ed. 319, 58 S. Ct. 334; Chicago, M. & St. P. R. Co. v. Public Utilities Commission (1927) 274 U. S. 344, 71 L. Ed. 1085, 47 S. Ct. 604; Illinois Cent. R. Co. v. Public Utilities Commission (1918) 245 U. S. 493, 62 L. Ed. 425, 38 S. Ct. 170.

Quotations.

"4. The contention that the Commission failed to find the fair value of respondent's property presents substantially the same question in another form. What the Commission found appears by its own opinion. The court below was bound to go to that opinion to ascertain the Commission's findings." (Mr. Chief Justice Hughes in Railroad Commission of California v. Pacific Gas & Electric Co. (1938) 302 U. S. 388, 400, 82 L. Ed. 319, 58 S. Ct. 334.)

⁸⁰ United States v. Louisiana (1933) 290 U. S. 70, 78 L. Ed. 181, 54

it unconstitutional,⁸¹ so, where two constructions of an agency's report and order are possible, under one of which the order is valid and under the other invalid, the construction under which the order is valid will be adopted and a suit to set aside the order based upon the other construction cannot prevail.⁸²

§ 446. Report and Order Should Be Construed Together: Related Documents.

In construing an administrative order the court should construe the order and accompanying report together as a whole. An order must be read in the light of the report.⁸³ Companion or related administrative reports and orders must be read and construed together.⁸⁴ Expressions in a first report, in conflict with a second report upon which the order is made, must be deemed to have been withdrawn.⁸⁵ Where there are two or more reports of the Interstate Commerce Commission in the same proceedings, and the later reports show affirmatively that they are supplemental to the original report, they should be read together and facts contained in the earlier reports

S. Ct. 28; *Chicago, R. I. & P. R. Co. v. United States* (1927) 274 U. S. 29, 71 L. Ed. 911, 47 S. Ct. 486.

⁸¹ *United States v. Shreveport Grain & Elevator Co.* (1932) 287 U. S. 77, 77 L. Ed. 175, 53 S. Ct. 42.

⁸² *Baltimore & O. R. Co. v. United States* (1938) 304 U. S. 58, 82 L. Ed. 1148, 58 S. Ct. 767; *National Labor Relations Board v. National Motor Bearing Co.* (C. C. A. 9th, 1939) 105 F. (2d) 652; *Chicago, M., St. P. & P. R. Co. v. United States* (N. D. Ill., E. Div., 1929) 33 F. (2d) 582, *aff'd* 282 U. S. 311, 75 L. Ed. 359, 51 S. Ct. 159.

⁸³ *Interstate Commerce Commission.*

Georgia Public Service Commission v. United States (1931) 283 U. S. 765, 75 L. Ed. 1397, 51 S. Ct. 619; *The New England Divisions Case* (1923) 261 U. S. 184, 67 L. Ed. 605, 43 S. Ct. 270; **Interstate Commerce Commission v. Union Pac. R. Co.* (1912) 222 U. S. 541, 56 L. Ed. 508, 32 S. Ct.

108; *South Carolina Asparagus Growers' Ass'n v. Southern Ry. Co.* (C. C. A. 4th, 1933) 64 F. (2d) 419, cert. den. 290 U. S. 647, 78 L. Ed. 561, 54 S. Ct. 65; *Ferd Brenner Lumber Co. v. Davis* (D. C. W. D. La., Alex. Div., 1925) 9 F. (2d) 960; *Penn Anthracite Mining Co. v. Delaware & H. R. Corp.* (D. C. M. D. Pa., 1936) 16 F. Supp. 732, *aff'd* 91 F. (2d) 634, cert. den. 302 U. S. 756, 82 L. Ed. 585, 58 S. Ct. 283.

State Agencies.

Arkansas Railroad Commission v. Chicago, R. I. & P. R. Co. (1927) 274 U. S. 597, 71 L. Ed. 1221, 47 S. Ct. 724.

⁸⁴ **Arkansas Railroad Commission v. Chicago, R. I. & P. R. Co.* (1927) 274 U. S. 597, 71 L. Ed. 1221, 47 S. Ct. 724.

⁸⁵ *The New England Divisions Case* (1923) 261 U. S. 184, 67 L. Ed. 605, 43 S. Ct. 270.

should be considered as part of the final report unless expressly repudiated.⁸⁶

§ 447. Power of State Courts to Construe Federal Administrative Orders.

A state court has the power to construe the order of a federal agency where such order is involved in an action within the jurisdiction of the state court.⁸⁷

§ 448. Dissenting Opinion in Report May Be Considered.

The court may notice that dissenting commissioners declare that reproduction cost was not considered in a valuation case, and this, in conjunction with the absence of mention of such consideration in the report, and the agreement of two of the majority of the members of the agency upon the point, may provide the basis for construction.⁸⁸

B. Construction of Statutes

§ 449. In General.

The construction of a statute presents a judicial question which must be decided by a reviewing court. The agency's construction is not binding on the court.⁸⁹

Statutes setting up administrative schemes are almost always in derogation of the common law. Yet because of their constructive purposes and significant delegation of power by legislatures to the administrative agencies statutes should be construed, not strictly, but in an orderly manner calculated to accomplish the constructive pur-

⁸⁶ Penn Anthracite Mining Co. v. Delaware & H. R. Corp. (D. C. M. D. Pa., 1936) 16 F. Supp. 732, aff'd 91 F. (2d) 634, cert. den. 302 U. S. 756, 82 L. Ed. 585, 58 S. Ct. 283.

⁸⁷ Central New England R. Co. v. Boston & A. R. Co. (1929) 279 U. S. 415, 73 L. Ed. 770, 49 S. Ct. 358.

⁸⁸ St. Louis & O'Fallon R. Co. v. United States (1929) 279 U. S. 461, 73 L. Ed. 798, 49 S. Ct. 384.

⁸⁹ Spiller v. Atchison, T. & S. F. R. Co. (1920) 253 U. S. 117, 64 L. Ed. 810, 40 S. Ct. 466; * Walker v. United States (C. C. A. 8th, 1936) 83 F. (2d) 103.

"We have, therefore, to deal only with a question of law, and that is, what is the true construction, in respect to the matters involved in the present controversy, of the act to regulate commerce? If the construction put upon the act by the Commission was right, then the order was lawful; otherwise it was not." (Mr. Justice Shiras in Texas & Pac. Ry. Co. v. Interstate Commerce Commission (1896) 162 U. S. 197, 210, 40 L. Ed. 940, 16 S. Ct. 666.) See also § 475 et seq.

poses desired.⁹⁰ This is not, however, to say that private rights should be given but casual attention, or that they should be disregarded simply because problems are complex and a legislative purpose is generally sympathetic to some solution.

The commonest query is as to the extent of the agency's power⁹¹ or

⁹⁰ "We need to be reminded, too, that in the construction of statutes establishing administrative agencies and defining their powers there is little scope for the ancient shibboleth that a statute in derogation of the common law must be strictly construed, or for placing an emphasis on their particulars which will defeat their obvious purpose. Legislatures create administrative agencies with the desire and expectation that they will perform efficiently the tasks committed to them. That, at least, is one of the contemplated social advantages to be weighed in resolving doubtful construction. It is an aim so obvious as to make unavoidable the conclusion that the function which courts are called upon to perform, in carrying into operation such administrative schemes, is constructive, not destructive, to make administrative agencies, wherever reasonably possible, effective instruments for law enforcement, and not to destroy them." Harlan F. Stone in "The Common Law in the United States" (1936) 50 Harv. L. Rev. 4, 18.

⁹¹ *Alien Cases*.

United States ex rel. Volpe v. Smith (1933) 289 U. S. 422, 77 L. Ed. 1298, 53 S. Ct. 665; *Costanzo v. Tillinghamast* (1932) 287 U. S. 341, 77 L. Ed. 350, 53 S. Ct. 152; *United States ex rel. Claussen v. Day* (1929) 279 U. S. 398, 73 L. Ed. 758, 49 S. Ct. 354; *Cheung Sum Shee v. Nagle* (1925) 268 U. S. 336, 69 L. Ed. 985, 45 S. Ct. 539; *Lancashire Shipping Co., Ltd. v. Elting* (C. C. A. 2d, 1934) 70 F. (2d) 699, cert. den. 293 U. S.

594, 79 L. Ed. 688, 55 S. Ct. 109.

Commissioner of Internal Revenue.

Williamsport Wire Rope Co. v. United States (1928) 277 U. S. 551, 72 L. Ed. 985, 48 S. Ct. 587.

Comptroller General.

Miguel v. McCarl (1934) 291 U. S. 442, 78 L. Ed. 901, 54 S. Ct. 465. *United States ex rel. Skinner & Eddy Corp. v. McCarl* (1927) 275 U. S. 1, 72 L. Ed. 131, 48 S. Ct. 12.

Federal Communications Commission.

Federal Communications Commission v. Sanders Bros. Radio Station (1940) 309 U. S. 470, 84 L. Ed. 869, 60 S. Ct. 693, rehearing denied 309 U. S. 642, 698, 84 L. Ed. 1037, 60 S. Ct. 693; **Federal Communications Commission v. Pottsville Broadcasting Co.* (1940) 309 U. S. 134, 84 L. Ed. 656, 60 S. Ct. 437; *Rochester Telephone Co. v. United States* (1939) 307 U. S. 125, 83 L. Ed. 1147, 59 S. Ct. 754; *Federal Radio Commission v. Nelson Bros. Bond & Mtg. Co.* (1933) 289 U. S. 266, 77 L. Ed. 1166, 53 S. Ct. 627, 89 A. L. R. 406; *Radio Service Corp. v. Federal Communications Commission* (1935) 64 App. D. C. 119, 78 F. (2d) 207; *Magnolia Petroleum Co. v. Federal Communications Commission* (1935) 76 F. (2d) 439.

Federal Power Commission.

Clarion River Power Co. v. Smith (1932) 61 App. D. C. 186, 59 F. (2d) 861, cert. den. 287 U. S. 639, 77 L. Ed. 553, 53 S. Ct. 88.

Federal Trade Commission.

Federal Trade Commission v. Eastman Kodak Co. (1927) 274 U. S. 619, 71 L. Ed. 1238, 47 S. Ct. 688; *Federal Trade Commission v. Western Meat*

authority, including questions of implied power.⁹² For instance

Co. (1926) 272 U. S. 554, 71 L. Ed. 405, 47 S. Ct. 175; Federal Trade Commission v. American Tobacco Co. (1924) 264 U. S. 298, 68 L. Ed. 696, 44 S. Ct. 336, 32 A. L. R. 786; Federal Trade Commission v. Sinclair Refining Co. (1923) 261 U. S. 463, 67 L. Ed. 746, 43 S. Ct. 450; Federal Trade Commission v. Beech-Nut Packing Co. (1922) 257 U. S. 441, 66 L. Ed. 307, 42 S. Ct. 150, 19 A. L. R. 882; Good-year Tire & Rubber Co. v. Federal Trade Commission (C. C. A. 6th, 1939) 101 F. (2d) 620, cert. den. 308 U. S. 557, 84 L. Ed. 468, 60 S. Ct. 74; Federal Trade Commission v. Good-Grape Co. (C. C. A. 6th, 1930) 45 F. (2d) 70.

Interstate Commerce Commission.

United States v. Lowden (1939) 308 U. S. 225, 84 L. Ed. 208, 60 S. Ct. 248; Shields v. Utah Idaho C. R. Co. (1938) 305 U. S. 177, 83 L. Ed. 111, 59 S. Ct. 160; Baltimore & O. R. Co. v. United States (1936) 298 U. S. 349, 80 L. Ed. 1209, 56 S. Ct. 797; United States ex rel. Chicago G. W. R. Co. v. Interstate Commerce Commission (1935) 294 U. S. 50, 79 L. Ed. 752, 55 S. Ct. 326; United States v. Baltimore & O. R. Co. (1935) 293 U. S. 454, 79 L. Ed. 587, 55 S. Ct. 268; Texas v. United States (1934) 292 U. S. 522, 78 L. Ed. 1402, 54 S. Ct. 819; Mississippi Valley Barge Line Co. v. United States (1934) 292 U. S. 282, 78 L. Ed. 1260, 54 S. Ct. 692; Texas & Pacific R. Co. v. United States (1933) 289 U. S. 627, 77 L. Ed. 1410, 53 S. Ct. 768; Transit Commission v. United States (1933) 289 U. S. 121, 77 L. Ed. 1075, 53 S. Ct. 536; New York Cent. R. Co. v. The Talisman (1933) 288 U. S. 239, 77 L. Ed. 721, 53 S. Ct. 328; Interstate Commerce Commission v. Oregon-Washington R. & Nav. Co. (1933) 288 U. S. 14, 77 L. Ed. 588, 53 S. Ct. 266;

* Alton R. Co. v. United States (1932) 287 U. S. 229, 77 L. Ed. 275, 53 S. Ct. 124; Norfolk & W. R. Co. v. United States (1932) 287 U. S. 134, 77 L. Ed. 218, 53 S. Ct. 52; United States v. Shreveport Grain & Elevator Co. (1932) 287 U. S. 77, 77 L. Ed. 175, 53 S. Ct. 42; New York Central Securities Corp. v. United States (1932) 287 U. S. 12, 77 L. Ed. 138, 53 S. Ct. 45; Atlantic Coast Line R. Co. v. United States (1932) 284 U. S. 288, 76 L. Ed. 298, 52 S. Ct. 171; * Interstate Commerce Commission v. United States ex rel. Los Angeles (1929) 280 U. S. 52, 74 L. Ed. 163, 50 S. Ct. 53; Atchison, T. & S. F. R. Co. v. United States (1929) 279 U. S. 768, 73 L. Ed. 947, 49 S. Ct. 494; St. Louis & O'Fallon R. Co. v. United States (1929) 279 U. S. 461, 73 L. Ed. 798, 49 S. Ct. 384; United States v. New York Cent. R. Co. (1929) 279 U. S. 73, 73 L. Ed. 619, 49 S. Ct. 260; Brimstone Railroad & Canal Co. v. United States (1928) 276 U. S. 104, 72 L. Ed. 487, 48 S. Ct. 282; Cleveland, C., C. & St. L. Ry. Co. v. United States (1928) 275 U. S. 404, 72 L. Ed. 338, 48 S. Ct. 189; News Syndicate Co. v. New York Cent. R. Co. (1927) 275 U. S. 179, 72 L. Ed. 225, 48 S. Ct. 39; * Chicago, R. I. & P. R. Co. v. United States (1927) 274 U. S. 29, 71 L. Ed. 911, 47 S. Ct. 486; United States v. New York Cent. R. Co. (1926) 272 U. S. 457, 71 L. Ed. 350, 47 S. Ct. 130; Western Paper Makers' Chemical Co. v. United States (1926) 271 U. S. 268, 70 L. Ed. 941, 46 S. Ct. 500; Colorado v. United States (1926) 271 U. S. 153, 70 L. Ed. 878, 46 S. Ct. 452; Minneapolis & St. L. R. Co. v. Peoria & P. U. R. Co. (1926) 270 U. S. 580, 70 L. Ed. 743, 46 S. Ct. 402; Chicago, I. & L. R. Co. v. United States (1926) 270 U. S. 287, 70 L. Ed. 590, 46 S. Ct. 226; United

the court will consider whether the provision of the Interstate Commerce Act which permits inquiry into carriers' expenditures, allows

States v. New River Co. (1924) 265 U. S. 533, 68 L. Ed. 1165, 44 S. Ct. 610; *United States v. American Railway Express Co.* (1924) 265 U. S. 425, 68 L. Ed. 1087, 44 S. Ct. 560; *United States v. Abilene & S. Ry. Co.* (1924) 265 U. S. 274, 68 L. Ed. 1016, 44 S. Ct. 565; *New York Cent. R. Co. v. United States* (1924) 265 U. S. 41, 68 L. Ed. 892, 44 S. Ct. 436; *United States v. New York Cent. R. Co.* (1924) 263 U. S. 603, 68 L. Ed. 470, 44 S. Ct. 212; *United States v. Illinois Cent. R. Co.* (1924) 263 U. S. 515, 68 L. Ed. 417, 44 S. Ct. 189; *Nashville, C. & St. L. Ry. v. Tennessee* (1923) 262 U. S. 318, 67 L. Ed. 999, 43 S. Ct. 583; *The New England Divisions Case* (1923) 261 U. S. 184, 67 L. Ed. 605, 43 S. Ct. 270; *Texas v. Eastern Texas R. Co.* (1922) 258 U. S. 204, 66 L. Ed. 566, 42 S. Ct. 281; *Railroad Commission of Wisconsin v. Chicago, B. & Q. R. Co.* (1922) 257 U. S. 563, 66 L. Ed. 371, 42 S. Ct. 232, 22 A. L. R. 1086; *Central R. Co. of New Jersey v. United States* (1921) 257 U. S. 247, 66 L. Ed. 217, 42 S. Ct. 80; *Spiller v. Atchison, T. & S. F. R. Co.* (1920) 253 U. S. 117, 64 L. Ed. 810, 40 S. Ct. 466; *Louisville Cement Co. v. United States* (1918) 246 U. S. 638, 62 L. Ed. 914, 38 S. Ct. 408; *Manufacturers R. Co. v. United States* (1918) 246 U. S. 457, 62 L. Ed. 831, 38 S. Ct. 383; *United States v. Pennsylvania R. Co.* (1916) 242 U. S. 208, 61 L. Ed. 251, 37 S. Ct. 95; **Pennsylvania Co. v. United States* (1915) 236 U. S. 351, 59 L. Ed. 616, 35 S. Ct. 370; *United States v. Louisville & N. R. Co.* (1915) 236 U. S. 318, 59 L. Ed. 598, 35 S. Ct. 363; *United States v. Louisville & N. R. Co.* (1914) 235 U. S. 314, 59 L. Ed. 245, 35 S. Ct. 113; **Intermountain Rate Cases* (1914)

234 U. S. 476, 58 L. Ed. 1408, 34 S. Ct. 986; *Houston, E. & W. T. Ry. Co. v. United States* (1914) 234 U. S. 342, 58 L. Ed. 1341, 34 S. Ct. 833; *Kansas City Southern Ry. Co. v. United States* (1913) 231 U. S. 423, 58 L. Ed. 296, 34 S. Ct. 125; *Louisville & N. R. Co. v. Garrett* (1913) 231 U. S. 298, 58 L. Ed. 229, 34 S. Ct. 48; *Interstate Commerce Commission v. Goodrich Transit Co.* (1912) 224 U. S. 194, 56 L. Ed. 729, 32 S. Ct. 436; *Interstate Commerce Commission v. Alabama Midland R. Co.* (1897) 168 U. S. 144, 42 L. Ed. 414, 18 S. Ct. 45; *Avent v. United States* (C. C. A. 6th, 1926) 15 F. (2d) 616; *Service Mut. Liability Ins. Co. v. United States* (D. C. D. Mass., 1937) 18 F. Supp. 613; *Missouri Pac. R. Co. v. United States* (D. C. E. D. Mo., E. Div., 1936) 16 F. Supp. 752.

National Labor Relations Board.

National Licorice Co. v. National Labor Relations Board (1940) 309 U. S. 350, 84 L. Ed. 799, 60 S. Ct. 569; *National Labor Relations Board v. Newport News Shipbuilding & Dry Dock Co.* (1939) 308 U. S. 241, 84 L. Ed. 219, 60 S. Ct. 203; *Consolidated Edison Co. v. National Labor Relations Board* (1938) 305 U. S. 197, 83 L. Ed. 126, 59 S. Ct. 206; *National Labor Relations Board v. National Motor Bearing Co.* (C. C. A. 9th, 1939) 105 F. (2d) 652; *National Labor Relations Board v. Stackpole Carbon Co.* (C. C. A. 3d, 1939) 105 F. (2d) 167, cert. den. 308 U. S. 605, 84 L. Ed. 506, 60 S. Ct. 142; *Virginia Ferry Corp. v. National Labor Relations Board* (C. C. A. 4th, 1939) 101 F. (2d) 103; *National Labor Relations Board v. Bell Oil & Gas Co.* (C. C. A. 5th, 1938) 98 F. (2d) 405; *National Labor Relations Board v. Hopwood Retinning Co., Inc.* (C. C.

the commission to investigate what amount, if any, a carrier has spent for political purposes, or whether the commission is limited to inquiry

A. 2d, 1938) 98 F. (2d) 97; *National Labor Relations Board v. Remington Rand, Inc.* (C. C. A. 2d, 1938) 94 F. (2d) 862; *National Labor Relations Board v. Bell Oil & Gas Co.* (C. C. A. 5th, 1937) 91 F. (2d) 509.

Postmaster General.

United States ex rel. Milwaukee Social Democratic Pub. Co. v. Burleson (1921) 255 U. S. 407, 65 L. Ed. 704, 41 S. Ct. 352.

The President.

Panama Refining Co. v. Ryan (1935) 293 U. S. 388, 79 L. Ed. 446, 55 S. Ct. 241; *A. L. A. Schechter Poultry Corp. v. United States* (1935) 295 U. S. 495, 79 L. Ed. 1570, 55 S. Ct. 837, 97 A. L. R. 947.

Railroad Labor Board.

Pennsylvania R. Co. v. United States Railroad Labor Board (1923) 261 U. S. 72, 67 L. Ed. 536, 43 S. Ct. 278.

Secretary of Agriculture.

H. P. Hood & Sons v. United States (1939) 307 U. S. 588, 83 L. Ed. 1478, 59 S. Ct. 1019; *United States v. Rock Royal Co-operative, Inc.* (1939) 307 U. S. 533, 83 L. Ed. 1446, 59 S. Ct. 993; *Wallace v. Cutten* (1936) 298 U. S. 229, 80 L. Ed. 1157, 56 S. Ct. 753; *Tagg Bros. & Moorhead v. United States* (1930) 280 U. S. 420, 74 L. Ed. 524, 50 S. Ct. 220; *United States v. American Livestock Co.* (1929) 279 U. S. 435, 73 L. Ed. 787, 49 S. Ct. 425; *Swift & Co. v. Wallace* (C. C. A. 7th, 1939) 105 F. (2d) 848; *United States v. Donahue Bros., Inc.* (C. C. A. 8th, 1932) 59 F. (2d) 1019.

Secretary of Commerce.

Isbrandtsen-Moller Co. v. United States (1937) 300 U. S. 139, 81 L. Ed. 562, 57 S. Ct. 407; *McCormick S. S. Co. v. United States* (D. C. N. D., Cal., S. Div., 1936) 16 F. Supp. 45.

Secretary of the Interior.

Work v. Louisiana (1925) 269 U. S. 250, 70 L. Ed. 259, 46 S. Ct. 92; *Swendig v. Washington Water Power Co.* (1924) 265 U. S. 322, 68 L. Ed. 1036, 44 S. Ct. 496; *United States ex rel. Knight v. Lane* (1913) 228 U. S. 6, 57 L. Ed. 709, 33 S. Ct. 407.

Securities and Exchange Commission.

Jones v. Securities & Exchange Commission (1936) 298 U. S. 1, 80 L. Ed. 1015, 56 S. Ct. 654; *Lawless v. Securities & Exchange Commission* (C. C. A. 1st, 1939) 105 F. (2d) 574; *Securities & Exchange Commission v. Robert Collier & Co., Inc.* (C. C. A. 2d, 1935) 76 F. (2d) 939.

State Agencies.

Driscoll v. Edison Light & Power Co. (1939) 307 U. S. 104, 83 L. Ed. 1134, 59 S. Ct. 715, rehearing denied 307 U. S. 650, 83 L. Ed. 1529, 59 S. Ct. 831; *Wadley Southern R. Co. v. Georgia* (1915) 235 U. S. 651, 59 L. Ed. 405, 35 S. Ct. 214; *Louisville & N. R. Co. v. Garrett* (1913) 231 U. S. 298, 58 L. Ed. 229, 34 S. Ct. 48; *Northern Pac. R. Co. v. Public Service Commission* (D. C. D. Ore., 1930) 47 F. (2d) 778; *Illinois Cent. R. Co. v. Vest* (D. C. E. D. Ky., 1927) 39 F. (2d) 658.

Tariff Commission.

Norwegian Nitrogen Products Co. v. United States Tariff Commission (1927) 274 U. S. 106, 71 L. Ed. 949, 47 S. Ct. 499.

United States Shipping Board.

Isthmian S. S. Co. v. United States (D. C. S. D. N. Y., 1931) 53 F. (2d) 251.

⁹² *United States v. Michigan Portland Cement Co.* (1926) 270 U. S. 521, 70 L. Ed. 713, 46 S. Ct. 395; *United States ex rel. Milwaukee Social Democratic Pub. Co. v. Burleson* (1921)

into evils or abuses definitely charged by itself as a complainant.⁹³

Specific judicial questions include: whether an agency has jurisdiction in a particular case;⁹⁴ whether power to regulate lies in a federal or state agency;⁹⁵ whether an administrative regulation is authorized by statute;⁹⁶ whether a statute authorizes any action at all in the case presented;⁹⁷ whether facts proven establish a violation of statute;⁹⁸ whether a state agency acted within the authority duly conferred by the legislature;⁹⁹ whether an agency has power to sue; and the manner in which it should be represented in court;¹ whether a particular condition to an order bears an appropriate relation to the authority exercised by the agency under the various acts empowering it;² whether an order, authorized on the basis of facts found by the agency, is without authority of law when applied to a changed situation;³ whether, the situation having changed, the agency is authorized to issue a modified order on the basis of the original record;⁴ what constitutes the purpose or policy of an act;⁵ whether

255 U. S. 407, 65 L. Ed. 704, 41 S. Ct. 352.

⁹³ *Smith v. Interstate Commerce Commission* (1917) 245 U. S. 33, 62 L. Ed. 135, 38 S. Ct. 30.

⁹⁴ See § 451.

⁹⁵ See § 450.

⁹⁶ See § 454.

⁹⁷ *Tagg Bros. & Moorhead v. United States* (1930) 280 U. S. 420, 74 L. Ed. 524, 50 S. Ct. 220; *Interstate Commerce Commission v. United States ex rel. Los Angeles* (1929) 280 U. S. 52, 74 L. Ed. 163, 50 S. Ct. 53. See *Arrow-Hart & Hegeman Electric Co. v. Federal Trade Commission* (1934) 291 U. S. 587, 78 L. Ed. 1007, 54 S. Ct. 532.

⁹⁸ *Alien Cases*.

Lloyd Sabauo Societa Anonima v. Elting (1932) 287 U. S. 329, 77 L. Ed. 341, 53 S. Ct. 167.

Federal Trade Commission.

Federal Trade Commission v. Pacific States Paper Trade Ass'n (1927) 273 U. S. 52, 71 L. Ed. 534, 47 S. Ct. 255.

Interstate Commerce Commission.

Interstate Commerce Commission v. Louisville & N. R. Co. (1903) 190 U.

S. 273, 47 L. Ed. 1047, 23 S. Ct. 687.

Secretary of Agriculture.

Wallace v. Cutten (1936) 298 U. S. 229, 80 L. Ed. 1157, 56 S. Ct. 753.

⁹⁹ *Wadley Southern R. Co. v. Georgia* (1915) 235 U. S. 651, 59 L. Ed. 405, 35 S. Ct. 214.

¹ *Securities & Exchange Commission v. Robert Collier & Co., Inc.* (C. C. A. 2d, 1935) 76 F. (2d) 939.

² *United States v. Lowden* (1939) 308 U. S. 225, 84 L. Ed. 208, 60 S. Ct. 248; *United States v. Chicago, M., St. P. & P. R. Co.* (1931) 282 U. S. 311, 75 L. Ed. 359, 51 S. Ct. 159.

³ *National Labor Relations Board v. Bell Oil & Gas Co.* (C. C. A. 5th, 1938) 98 F. (2d) 405; *National Labor Relations Board v. Bell Oil & Gas Co.* (C. C. A. 5th, 1937) 91 F. (2d) 509.

⁴ *Federal Trade Commission v. Good-Grape Co.* (C. C. A. 6th, 1930) 45 F. (2d) 70.

⁵ **Federal Communications Commission.**

Federal Communications Commission v. Sanders Bros. Radio Station (1940) 309 U. S. 470, 84 L. Ed. 869, 60 S. Ct. 693, rehearing denied 309 U.

a statute is to be liberally construed;⁶ what interpretation should be given to the legislative standard "public interest";⁷ whether a statutory plan merely calls for voluntary cooperative effort, or gives the delegate of the legislature power to make laws;⁸ whether a statute provides for legislative or judicial review;⁹ under which section of an act Congress meant to give relief in a given case;¹⁰ whether a crime involves moral turpitude so as to subject a party to the operation of a statute;¹¹ whether motive is an element of an offense;¹² what constitutes "entry" under the immigration laws;¹³ whether under a statute providing for its issue, a permit without specific reservation is revocable;¹⁴ and whether a statute establishing an agency conflicts with another statute.¹⁵

S. 642, 698, 84 L. Ed. 1037, 60 S. Ct. 693.

Federal Trade Commission.

Federal Trade Commission v. Sinclair Refining Co. (1923) 261 U. S. 463, 67 L. Ed. 746, 43 S. Ct. 450.

Interstate Commerce Commission.

Colorado v. United States (1926) 271 U. S. 153, 70 L. Ed. 878, 46 S. Ct. 452; The New England Divisions Case (1923) 261 U. S. 184, 67 L. Ed. 605, 43 S. Ct. 270.

The President.

A. L. A. Schechter Poultry Corp. v. United States (1935) 295 U. S. 495, 79 L. Ed. 1570, 55 S. Ct. 837, 97 A. L. R. 947.

Secretary of the Interior.

Work v. Louisiana (1925) 269 U. S. 250, 70 L. Ed. 258, 46 S. Ct. 92.

⁶New York Cent. R. Co. v. United States (1924) 265 U. S. 41, 68 L. Ed. 892, 44 S. Ct. 436; Pennsylvania R. Co. v. United States Railroad Labor Board (1923) 261 U. S. 72, 67 L. Ed. 536, 43 S. Ct. 278.

⁷United States v. Lowden (1939) 308 U. S. 225, 84 L. Ed. 208, 60 S. Ct. 248; Federal Radio Commission v. Nelson Bros. Bond & Mtg. Co. (1933) 289 U. S. 266, 77 L. Ed. 1166, 53 S. Ct. 627, 89 A. L. R. 406; New York Central Securities Corp. v. United States (1932) 287 U. S. 12, 77 L. Ed. 138, 53 S. Ct. 45.

⁸A. L. A. Schechter Poultry Corp. v. United States (1935) 295 U. S. 495, 79 L. Ed. 1570, 55 S. Ct. 837, 97 A. L. R. 947.

⁹Williamsport Wire Rope Co. v. United States (1928) 277 U. S. 551, 72 L. Ed. 985, 48 S. Ct. 587; Red River Broadcasting Co. v. Federal Communications Commission (1938) 98 F. (2d) 282, cert. den. 305 U. S. 625, 83 L. Ed. 400, 59 S. Ct. 86. See Crowell v. Benson (1932) 285 U. S. 22, 76 L. Ed. 598, 52 S. Ct. 285.

¹⁰Central R. Co. of New Jersey v. United States (1921) 257 U. S. 247, 66 L. Ed. 217, 42 S. Ct. 80.

¹¹United States ex rel. Volpe v. Smith (1933) 289 U. S. 422, 77 L. Ed. 1298, 53 S. Ct. 665.

¹²Federal Trade Commission v. Algoma Lumber Co. (1934) 291 U. S. 67, 78 L. Ed. 655, 54 S. Ct. 315.

¹³United States ex rel. Claussen v. Day (1929) 279 U. S. 398, 73 L. Ed. 758, 49 S. Ct. 354.

¹⁴United States ex rel. Milwaukee Social Democratic Pub. Co. v. Burleson (1921) 255 U. S. 407, 65 L. Ed. 704, 41 S. Ct. 352.

¹⁵Radio Service Corp. v. Federal Communications Commission (1935) 64 App. D. C. 119, 78 F. (2d) 207; Magnolia Petroleum Co. v. Federal Communications Commission (1935) 64 App. D. C. 189, 76 F. (2d) 439.

§ 450. Whether Power Is in Federal or State Agency.

Judicial questions include whether a particular power, formerly left to state agencies, has been exclusively delegated to a federal agency so as to limit the powers of the state.¹⁶ Thus, whether legislation giving the Interstate Commerce Commission power over the use of railway terminals renders invalid a state agency's order to build a new union station, is a judicial question.¹⁷ Whether the Interstate Commerce Commission has jurisdiction over an intrastate trackage agreement is a judicial question, in the course of deciding which the court construed, *inter alia*, "extension," "operation of a line of railroad," "engage in transportation by means of such extended line of railroad," and "abandonment" of "a portion of a line of railroad."¹⁸

§ 451. Jurisdiction.

Judicial questions include whether an administrative agency has jurisdiction over a party,¹⁹ over acts within particular terri-

¹⁶ *Transit Commission v. United States* (1933) 289 U. S. 121, 77 L. Ed. 1075, 53 S. Ct. 536; *Lehigh Valley R. Co. v. Board of Public Utility Com'rs* (1928) 278 U. S. 24, 73 L. Ed. 161, 49 S. Ct. 69, 62 A. L. R. 805; *Missouri Pac. R. Corp. v. Nebraska State Railway Commission* (C. C. A. 8th, 1933) 65 F. (2d) 557, cert. den. 290 U. S. 656, 78 L. Ed. 568, 54 S. Ct. 72; *Railroad Commission of California v. Southern Pac. Co.* (1924) 264 U. S. 331, 68 L. Ed. 713, 44 S. Ct. 376; *Chicago, M., St. P. & P. R. Co. v. Campbell River Mills Co., Ltd.* (C. C. A. 9th, 1931) 53 F. (2d) 69, cert. den. (1932) 285 U. S. 536, 76 L. Ed. 930, 52 S. Ct. 310.

¹⁷ *Railroad Commission of California v. Southern Pac. Co.* (1924) 264 U. S. 331, 68 L. Ed. 713, 44 S. Ct. 376.

¹⁸ *Transit Commission v. United States* (1933) 289 U. S. 121, 77 L. Ed. 1075, 53 S. Ct. 536.

¹⁹ *Alien Cases.*

Kessler v. Strecker (1939) 307 U. S. 22, 83 L. Ed. 1082, 59 S. Ct. 694; *Ng Fung Ho v. White* (1922) 259

U. S. 276, 66 L. Ed. 938, 42 S. Ct. 492; *Gegiow v. Uhl* (1915) 239 U. S. 3, 60 L. Ed. 114, 36 S. Ct. 2.

Commissioner of Prohibition.

Roge Laboratories v. Doran (1931) 60 App. D. C. 51, 47 F. (2d) 413.

Federal Communications Commission.

Rochester Telephone Corp. v. United States (1939) 307 U. S. 125, 83 L. Ed. 1147, 59 S. Ct. 754.

Federal Power Commission.

Grand River Dam Authority v. Going (D. C. N. D. Okla., 1939) 29 F. Supp. 316.

Federal Trade Commission.

Arrow-Hart & Hegeman Electric Co. v. Federal Trade Commission (1934) 291 U. S. 587, 78 L. Ed. 1007, 54 S. Ct. 532; *Federal Trade Commission v. Raladam Co.* (1931) 283 U. S. 643, 75 L. Ed. 1324, 51 S. Ct. 587, 79 A. L. R. 1191.

Interstate Commerce Commission.

* *Union Stock Yard & Transit Co. v. United States* (1939) 308 U. S. 213, 84 L. Ed. 198, 60 S. Ct. 193; *Piedmont & N. R. Co. v. United States* (1930) 280 U. S. 469, 74 L. Ed. 551, 50 S. Ct. 192; *Omaha & C. B. S.*

tory,²⁰ or over subject matter of a particular dispute.²¹ For instance, whether a statutory phrase limiting the jurisdiction of the Interstate Commerce Commission over reparation matters to two years refers to a period commencing at the time of shipments or at the time of over-

R. Co. v. Interstate Commerce Commission (1913) 230 U. S. 324, 57 L. Ed. 1501, 33 S. Ct. 890.

National Labor Relations Board.

National Labor Relations Board v. Fainblatt (1939) 306 U. S. 601, 83 L. Ed. 1014, 59 S. Ct. 668; *Washington, Va. & Md. Coach Co. v. National Labor Relations Board* (1937) 301 U. S. 142, 81 L. Ed. 965, 57 S. Ct. 648; *Associated Press v. National Labor Relations Board* (1937) 301 U. S. 103, 81 L. Ed. 953, 57 S. Ct. 650; *National Labor Relations Board v. Jones & Laughlin Steel Corp.* (1937) 301 U. S. 1, 81 L. Ed. 893, 57 S. Ct. 615, 108 A. L. R. 1352; *National Labor Relations Board v. Fruehauf Trailer Co.* (1937) 301 U. S. 49, 81 L. Ed. 918, 57 S. Ct. 642, 108 A. L. R. 1352; *National Labor Relations Board v. Friedman-Harry Marks Clothing Co.* (1937) 301 U. S. 58, 81 L. Ed. 921, 57 S. Ct. 645, 108 A. L. R. 1352; *National Labor Relations Board v. H. E. Fletcher Co.* (C. C. A. 1st, 1939) 108 F. (2d) 459; *National Labor Relations Board v. Cowell Portland Cement Co.* (C. C. A. 9th, 1939) 108 F. (2d) 198; *National Labor Relations Board v. Crowe Coal Co.* (C. C. A. 8th, 1939) 104 F. (2d) 633; *National Labor Relations Board v. Idaho-Maryland M. Corp.* (C. C. A. 9th, 1938) 98 F. (2d) 129.

State Agencies.

Transit Commission v. United States (1933) 289 U. S. 121, 77 L. Ed. 1075, 53 S. Ct. 536.

Workmen's Compensation Cases.

Crowell v. Benson (1932) 285 U. S. 22, 76 L. Ed. 598, 52 S. Ct. 285.

²⁰ *Federal Trade Commission v. Klesner* (1927) 274 U. S. 145, 71 L. Ed. 972, 47 S. Ct. 557; *Interstate Commerce Commission v. United States ex rel. Humboldt S. S. Co.* (1912) 224 U. S. 474, 56 L. Ed. 849, 32 S. Ct. 556.
²¹ *Federal Trade Commission.*

Hills Bros. v. Federal Trade Commission (C. C. A. 9th, 1926) 9 F. (2d) 481, cert. den. 270 U. S. 662, 70 L. Ed. 787, 46 S. Ct. 471.

Interstate Commerce Commission.

Louisville Cement Co. v. Interstate Commerce Commission (1918) 246 U. S. 638, 62 L. Ed. 914, 38 S. Ct. 408; *Gulf, M. & N. R. Co. v. Illinois Central R. Co.* (D. C. W. D. Tenn., E. Div., 1937) 21 F. Supp. 282, appeal dismissed 109 F. (2d) 1016; *Baltimore & O. R. Co. v. United States* (D. C. N. D. N. Y., 1936) 15 F. Supp. 674.

Maritime Commission.

Roberto Hernandez, Inc. v. Arnold Bernstein Schiffahrtsgesellschaft, M. B. H. (D. C. S. D. N. Y., 1940) 31 F. Supp. 76.

National Labor Relations Board.

National Labor Relations Board v. Cowell Portland Cement Co. (C. C. A. 9th, 1939) 108 F. (2d) 198; *Jeffery-De Witt Insulator Co. v. National Labor Relations Board* (C. C. A. 4th, 1937), 91 F. (2d) 134, cert. den. 302 U. S. 731, 82 L. Ed. 565, 58 S. Ct. 55, 112 A. L. R. 948.

State Agencies.

Minnie v. Port Huron Terminal Co. (1935) 295 U. S. 647, 79 L. Ed. 1631, 55 S. Ct. 884; *Missouri Pac. R. Corp. v. Nebraska State Railway Commission* (C. C. A. 8th, 1933), 65 F. (2d) 557, cert. den. 290 U. S. 656, 78 L. Ed. 568, 54 S. Ct. 72.

payment, is a judicial question.²² Whether facts found exhibit a situation over which the agency has power is a judicial question.²³ Where, during the pendency of a proceeding for a reparation award, the party defendant ceased to be a common carrier, the question whether the jurisdiction of the agency continues for purposes of entering an enforceable order against the party is a judicial question.²⁴

§ 452. — "Jurisdictional Facts."

While the doctrine of administrative finality²⁵ applies to determinations of fact which are within the purview of a statute, a different question is presented where determinations of fact are fundamental or "jurisdictional," in the sense that their existence is a constitutional condition precedent to the operation of the statutory scheme. These determine whether a given case falls within the scope of authority which may be validly conferred upon the agency, that is to say, the scope of the constitutional power of Congress or the executive.²⁶ These questions are for the decision of the court in a trial *de novo*.²⁷ In relation to these basic facts, the question is not the ordinary one as to the propriety of provision for administrative determinations. Nor is there simply the question of due process in relation to notice and hearing. It is rather a question of the appropriate maintenance of the federal judicial power in requiring the observance of constitutional restrictions.²⁸ Alienage is an essential jurisdictional fact, and an order of deportation must be predicated upon a finding of that fact. That finding goes, however, to the very constitutional power of Congress and its administrative agent respecting deportation.²⁹ Conversely, the doctrine of administrative finality applies to the determination of the question whether the coal mined by a party is bituminous or anthracite, even though whether the agency has jurisdiction over a party may depend upon that determination. Congress has the power to grant jurisdiction over both bituminous and

²² Louisville Cement Co. v. Interstate Commerce Commission (1918) 246 U. S. 638, 62 L. Ed. 914, 38 S. Ct. 408.

²³ Louisville & N. R. Co. v. United States (1915) 238 U. S. 1, 59 L. Ed. 1177, 35 S. Ct. 696.

²⁴ Glens Falls Portland Cement Co. v. Delaware & Hudson Co. (C. C. A. 2d, 1933) 66 F. (2d) 490, cert. den. 290 U. S. 697, 78 L. Ed. 599, 54 S. Ct. 132.

²⁵ See § 509 et seq.

²⁶ Crowell v. Benson (1932) 285 U. S. 22, 76 L. Ed. 598, 52 S. Ct. 285.

²⁷ See § 262 et seq.

²⁸ Crowell v. Benson (1932) 285 U. S. 22, 76 L. Ed. 598, 52 S. Ct. 285.

²⁹ United States ex rel. Bilokumsky v. Tod (1923) 263 U. S. 149, 68 L. Ed. 221, 44 S. Ct. 54; Ng Fung Ho v. White (1922) 259 U. S. 276, 66 L. Ed. 938, 42 S. Ct. 492. See also § 262 et seq.

anthracite coal under the circumstances of the Act, and no "jurisdictional fact" is involved.³⁰

§ 453. — Whether Interstate Commerce Is Involved.

With regard to federal agencies, the usual jurisdictional judicial question is whether interstate³¹ or foreign³² commerce is involved.

§ 454. Whether Administrative Regulation Is Authorized by Statute.

Whether an administrative rule, regulation,³³ or practice³⁴ purportedly adopted pursuant to statutory authority, is within that au-

³⁰ *Sunshine Anthracite Coal Co. v. National Bituminous Coal Commission* (C. C. A. 8th, 1939) 105 F. (2d) 559, cert. den. 308 U. S. 604, 84 L. Ed. 505, 60 S. Ct. 142, rehearing denied 308 U. S. 638, 84 L. Ed. 530, 60 S. Ct. 260.

³¹ Federal Trade Commission.

Federal Trade Commission v. Pacific States Paper Trade Ass'n (1927) 273 U. S. 52, 71 L. Ed. 534, 47 S. Ct. 255.

Interstate Commerce Commission.

Colorado v. United States (1926) 271 U. S. 153, 70 L. Ed. 878, 46 S. Ct. 452; *United States v. Union Stock Yard & Transit Co.* (1912) 226 U. S. 286, 57 L. Ed. 104, 33 S. Ct. 83.

National Labor Relations Board.

Consolidated Edison Co. v. National Labor Relations Board (1938) 305 U. S. 197, 83 L. Ed. 126, 59 S. Ct. 206; *National Labor Relations Board v. Idaho-Maryland M. Corp.* (C. C. A. 9th, 1938) 98 F. (2d) 129.

The President.

A. L. A. Schechter Poultry Corp. v. United States (1935) 295 U. S. 495, 79 L. Ed. 1570, 55 S. Ct. 837, 97 A. L. R. 947.

State Agencies.

Railroad Commission v. Chicago, B. & Q. R. Co. (1922) 257 U. S. 563, 66 L. Ed. 371, 42 S. Ct. 232, 22 A. L. R. 1086; *Southern Pac. Co. v. Van Hoosear* (C. C. A. 9th, 1934) 72 F. (2d) 903.

³² *United States v. Erie R. Co.* (1929) 280 U. S. 98, 74 L. Ed. 187, 50 S. Ct. 51.

³³ Alien Cases.

United States ex rel. Di Mieri v. Uhl (C. C. A. 2d, 1938) 96 F. (2d) 92.

Board of Tax Appeals.

Murphy Oil Co. v. Burnet (1932) 287 U. S. 299, 77 L. Ed. 318, 53 S. Ct. 161; *Old Colony R. Co. v. Commissioner of Internal Revenue* (1932) 284 U. S. 552, 76 L. Ed. 484, 52 S. Ct. 211.

Board of Tea Appeals.

Waite v. Macy (1918) 246 U. S. 606, 62 L. Ed. 892, 38 S. Ct. 395.

Interstate Commerce Commission.

United States v. Michigan Portland Cement Co. (1926) 270 U. S. 521, 70 L. Ed. 713, 46 S. Ct. 395.

Public Utilities Commission (District of Columbia).

Patrick v. Smith (1930) 60 App. D. C. 6, 45 F. (2d) 924.

Secretary of Agriculture.

United States v. Grimaud (1911) 220 U. S. 506, 55 L. Ed. 563, 31 S. Ct. 480; *Illinois Cent. R. Co. v. McKendree* (1906) 203 U. S. 514, 51 L. Ed. 298, 27 S. Ct. 153.

Secretary of the Interior.

* *United States v. George* (1913) 228 U. S. 14, 57 L. Ed. 712, 33 S. Ct. 412; *United States v. United Verde Copper Co.* (1905) 196 U. S. 207, 49 L. Ed. 449, 25 S. Ct. 222.

thority, is a judicial question.³⁵ Thus, where a statute authorized the Secretary of the Treasury (afterwards, by amendment, the Secretary of Agriculture) to make regulations excluding tea below established standards of purity, quality and fitness for consumption, the question whether the statute authorized a regulation excluding tea containing any amount, however small, of artificial coloring matter, is a judicial question.³⁶ A statute providing that timber on the public lands be used for farming, mining and other domestic purposes only was held not to authorize a regulation prohibiting the use of timber for smelting; the court holding that the agency had no power to define "domestic" or "mining."³⁷ A specific power conferred upon the Railroad Labor Board was to "make regulations necessary for the efficient execution of the functions vested in it." Whether this includes the authority to determine who are proper representatives of employees, and to make reasonable rules for ascertaining the choice of the employees, is a judicial question.³⁸ Whether regulations prescribing methods of accounting are so entirely at odds with fundamental principles of correct accounting as intrinsically to manifest an abuse of power, is a judicial question.³⁹

§ 455. Whether Fine Imposed Is Authorized by Statute.

Whether a fine imposed by a tax collector on the basis of a particular state of facts, was properly imposed, is a judicial question.⁴⁰

§ 456. Extent of Agency's Statutory Duty.

Questions as to the scope and nature of the duty imposed upon an administrative agency by statute are judicial questions.⁴¹ These in-

Secretary of the Treasury.

United States v. Eaton (1892) 144 U. S. 677, 36 L. Ed. 591, 12 S. Ct. 764.

³⁴ *United States v. Missouri Pac. R. Co.* (1929) 278 U. S. 269, 73 L. Ed. 322, 49 S. Ct. 133; *The Assigned Car Cases* (1927) 274 U. S. 564, 71 L. Ed. 1204, 47 S. Ct. 727.

³⁵ See § 489 et seq.

³⁶ *Waite v. Macy* (1918) 246 U. S. 606, 62 L. Ed. 892, 38 S. Ct. 395.

³⁷ *United States v. United Verde Copper Co.* (1905) 196 U. S. 207, 49 L. Ed. 449, 25 S. Ct. 222.

³⁸ *Pennsylvania R. Co. v. United States Railroad Labor Board* (1923)

261 U. S. 72, 67 L. Ed. 536, 43 S. Ct. 278.

³⁹ *Kansas City Southern Ry. Co. v. Interstate Commerce Commission* (1913) 231 U. S. 423, 58 L. Ed. 296, 34 S. Ct. 125.

⁴⁰ *Compagnie Generale Transatlantique v. Elting* (1936) 298 U. S. 217, 80 L. Ed. 1151, 56 S. Ct. 770.

⁴¹ *Alien Cases.*

Lloyd Sabaudo Societa Anonima v. Elting (1932) 287 U. S. 329, 77 L. Ed. 341, 53 S. Ct. 167.

Comptroller General.

United States ex rel. Skinner & Eddy Corp. v. McCarl (1927) 275 U. S. 1, 72 L. Ed. 131, 48 S. Ct. 12.

clude whether a statutory duty is so plain that its performance is a purely ministerial act, which can be compelled by mandamus;⁴² whether an agency must weigh and make findings upon particular factors;⁴³ what factors must be considered by an administrative agency in its determination of an administrative question;⁴⁴ and whether those factors have been considered.⁴⁵

§ 457. Questions Under the Immigration Laws.

Whether a person is a "subject" of a given foreign country within the meaning of a statute is a judicial question;⁴⁶ as are the questions of: whether a statutory quota has been filled;⁴⁷ whether a person is an "immigrant";⁴⁸ whether a person is a citizen of the United States;⁴⁹ whether alterations void a passport;⁵⁰ whether a crime of

Interstate Commerce Commission.

The New England Divisions Case (1923) 261 U. S. 184, 67 L. Ed. 605, 43 S. Ct. 270.

State Agencies.

Railroad Commission of Wisconsin v. Chicago, B. & Q. R. Co. (1922) 257 U. S. 563, 66 L. Ed. 371, 42 S. Ct. 232, 22 A. L. R. 1036.

⁴² Miguel v. McCarl (1934) 291 U. S. 442, 78 L. Ed. 901, 54 S. Ct. 465; Interstate Commerce Commission v. New York, N. H. & H. R. Co. (1932) 287 U. S. 178, 77 L. Ed. 248, 53 S. Ct. 106; United States ex rel. Kansas City Southern Ry. Co. v. Interstate Commerce Commission (1920) 252 U. S. 178, 64 L. Ed. 517, 40 S. Ct. 187. See United States ex rel. Hall v. Payne (1920) 254 U. S. 343, 65 L. Ed. 295, 41 S. Ct. 131. See also § 638 et seq.

⁴³ Federal Communications Commission v. Sanders Bros. Radio Station (1940) 309 U. S. 470, 84 L. Ed. 869, 60 S. Ct. 693, rehearing denied 309 U. S. 642, 698, 84 L. Ed. 1037, 60 S. Ct. 693; Louisville & N. R. Co. v. Behlmer (1900) 175 U. S. 648, 44 L. Ed. 309, 20 S. Ct. 209.

⁴⁴ Interstate Commerce Commission.

Interstate Commerce Commission v. New York, N. H. & H. R. Co. (1932) 287 U. S. 178, 77 L. Ed. 248, 53 S. Ct. 106; United States v. Abilene & S. Ry. Co. (1924) 265 U. S. 274, 68 L. Ed. 1016, 44 S. Ct. 565; The New England Divisions Case (1923) 261 U. S. 184, 67 L. Ed. 605, 43 S. Ct. 270.

Secretary of Agriculture.

Swift & Co. v. Wallace (C. C. A. 7th, 1939) 105 F. (2d) 848.

⁴⁵ Brimstone R. & C. Co. v. United States (1928) 276 U. S. 104, 72 L. Ed. 487, 48 S. Ct. 282.

⁴⁶ Nagle v. Loi Hoa (1928) 275 U. S. 475, 72 L. Ed. 381, 48 S. Ct. 160.

⁴⁷ Commissioner of Immigration v. Gottlieb (1924) 265 U. S. 310, 68 L. Ed. 1031, 44 S. Ct. 528.

⁴⁸ United States ex rel. Di Mieri v. Uhl (C. C. A. 2d, 1938) 96 F. (2d) 92; Lloyd Royal Belge Societe Anonyme v. Elting (C. C. A. 2d, 1932) 61 F. (2d) 745, cert. den. 289 U. S. 730, 77 L. Ed. 1479, 53 S. Ct. 526.

⁴⁹ See § 262 et seq.

⁵⁰ United States ex rel. Di Mieri v. Uhl (C. C. A. 2d, 1938) 96 F. (2d) 92.

which an alien has been convicted involves moral turpitude;⁵¹ and whether the General Immigration Act of 1917⁵² applies to a Chinese laborer who has no certificate of residence, despite his legal entry into the United States.⁵³

§ 458. Questions Under the Interstate Commerce Act and Related Statutes.

§ 459. — Questions of Definition or Legal Meaning.

Under the Interstate Commerce Act and related statutes the following construction questions have been held to be judicial: whether a party is a "person";⁵⁴ whether a person is a "shipper";⁵⁵ whether a party is a "common carrier,"⁵⁶ a "carrier by railroad";⁵⁷ or a "carrier involved";⁵⁸ whether two railroads not actually contiguous are "connecting carriers";⁵⁹ whether connecting carriers participating in joint rates are partners;⁶⁰ whether a carrier not participating

⁵¹ *United States ex rel. Millard v. Tuttle* (D. C. E. D. La., 1930) 46 F. (2d) 342; *United States ex rel. Squilari v. Day* (C. C. A. 3d, 1929) 35 F. (2d) 284.

⁵² 8 USCA 101 et seq.

⁵³ *Ng Fung Ho v. White* (1922) 259 U. S. 276, 66 L. Ed. 938, 42 S. Ct. 492.

⁵⁴ *Merchants Warehouse Co. v. United States* (1931) 283 U. S. 501, 75 L. Ed. 1227, 51 S. Ct. 505; *Interstate Commerce Commission v. Delaware, L. & W. R. Co.* (1911) 220 U. S. 235, 55 L. Ed. 448, 31 S. Ct. 392.

⁵⁵ *Cleveland, C., C. & St. L. Ry. Co. v. United States* (1928) 275 U. S. 404, 72 L. Ed. 338, 48 S. Ct. 189.

⁵⁶ *Interstate Commerce Commission.*

Union Stock Yard & Transit Co. v. United States (1939) 308 U. S. 213, 84 L. Ed. 198, 60 S. Ct. 193; *Valvoline Oil Co. v. United States* (1939) 308 U. S. 141, 84 L. Ed. 112, 60 S. Ct. 160; *Powell v. United States* (1937) 300 U. S. 276, 81 L. Ed. 643, 57 S. Ct. 470; *United States v. Village of Hubbard* (1925) 266 U. S. 474, 69 L. Ed. 389, 45 S. Ct. 160; **The Tap Line Cases* (1914) 234 U. S. 1, 58 L. Ed.

1185, 34 S. Ct. 741; *The Pipe Line Cases* (1914) 234 U. S. 548, 58 L. Ed. 1459, 34 S. Ct. 956; *United States v. Union Stock Yard & Transit Co.* (1912) 226 U. S. 286, 57 L. Ed. 226, 33 S. Ct. 83.

⁵⁷ *United States ex rel. Chicago, New York & Boston Refrigerator Co. v. Interstate Commerce Commission* (1924) 265 U. S. 292, 68 L. Ed. 1024, 44 S. Ct. 558; *United States v. American Railway Express Co.* (1924) 265 U. S. 425, 68 L. Ed. 1087, 44 S. Ct. 560.

⁵⁸ 49 USCA 5 (1). *Escanaba & Lake Superior Railroad Co. v. United States* (1938) 303 U. S. 315, 82 L. Ed. 867, 58 S. Ct. 556; *United States v. Chicago, N. S. & M. R. Co.* (1933) 288 U. S. 1, 77 L. Ed. 583, 53 S. Ct. 245; *Interstate Commerce Commission v. Goodrich Transit Co.* (1912) 224 U. S. 194, 56 L. Ed. 729, 32 S. Ct. 436.

⁵⁹ *Atlantic Coast Line R. Co. v. United States* (1932) 284 U. S. 288, 76 L. Ed. 298, 52 S. Ct. 171.

⁶⁰ *Central R. Co. of New Jersey v. United States* (1921) 257 U. S. 247, 66 L. Ed. 217, 42 S. Ct. 80.

in joint rates with inbound roads is an "intermediate carrier";⁶¹ whether a certain point is a "locality";⁶² whether certain tracks are, within the meaning of section 1(18), an "extension" or "addition";⁶³ whether a railroad is a "lateral, branch line";⁶⁴ what constitutes a "through route";⁶⁵ whether certain services, such as the loading and unloading of cattle carried in railroad cars, are common carrier services;⁶⁶ whether "car service" includes carrier-owned cars which carry railroad fuel;⁶⁷ what constitutes a "practice";⁶⁸ and whether or not certain practices constitute a "rebate."⁶⁹

§ 460. — Questions Concerning Discrimination.

The following questions have been held to be judicial: whether "discrimination" means unjust or undue discrimination;⁷⁰ whether a certain sort of discrimination is within the act;⁷¹ whether discrimination found to exist can be held to be attributable to certain carriers, as a matter of law;⁷² whether the factor of competition by

⁶¹ *Alton R. Co. v. United States* (1932) 287 U. S. 229, 77 L. Ed. 275, 53 S. Ct. 124.

⁶² *Texas & Pacific R. Co. v. United States* (1933) 289 U. S. 627, 77 L. Ed. 1410, 53 S. Ct. 768.

⁶³ *Powell v. United States* (1937) 300 U. S. 276, 81 L. Ed. 643, 57 S. Ct. 470; *Transit Commission v. United States* (1933) 289 U. S. 121, 77 L. Ed. 1075, 53 S. Ct. 536; *Cleveland, C. & St. L. R. Co. v. United States* (1928) 275 U. S. 404, 72 L. Ed. 338, 48 S. Ct. 189; *Railroad Commission v. Southern P. Co.* (1924) 264 U. S. 331, 68 L. Ed. 713, 44 S. Ct. 376; *Missouri Pac. R. Co. v. Chicago, R. I. & P. R. Co.* (C. C. A. 8th, 1930) 41 F. (2d) 188, cert. den. 282 U. S. 866, 75 L. Ed. 765, 51 S. Ct. 74; *Detroit Terminal R. Co. v. Pennsylvania-Detroit R. Co.* (C. C. A. 6th, 1926) 15 F. (2d) 507, cert. den. 273 U. S. 758, 71 L. Ed. 877, 47 S. Ct. 472.

⁶⁴ *United States v. Baltimore & O. S. W. R. Co.* (1912) 226 U. S. 14, 57 L. Ed. 104, 33 S. Ct. 5.

⁶⁵ *United States v. Missouri Pac. R. Co.* (1929) 278 U. S. 269, 73 L. Ed. 322, 49 S. Ct. 133; *Louisville & N.*

R. Co. v. Behlmer (1900) 175 U. S. 648, 44 L. Ed. 309, 20 S. Ct. 209.

⁶⁶ *Union Stock Yard & Transit Co. v. United States* (1939) 308 U. S. 213, 84 L. Ed. 198, 60 S. Ct. 193; *Aron v. Pennsylvania R. Co.* (C. C. A. 2d, 1935) 80 F. (2d) 100.

⁶⁷ *The Assigned Car Cases* (1927) 274 U. S. 564, 71 L. Ed. 1204, 47 S. Ct. 727.

⁶⁸ *Baltimore & O. R. Co. v. United States* (1928) 277 U. S. 291, 72 L. Ed. 885, 48 S. Ct. 520.

⁶⁹ *Baltimore & O. R. Co. v. United States* (1939) 305 U. S. 507, 83 L. Ed. 318, 59 S. Ct. 284. See *Merchants Warehouse Co. v. United States* (1931) 283 U. S. 501, 75 L. Ed. 1227, 51 S. Ct. 505; *United States v. Union Stock Yard & Transit Co.* (1912) 226 U. S. 286, 57 L. Ed. 226, 33 S. Ct. 83.

⁷⁰ *Manufacturers R. Co. v. United States* (1918) 246 U. S. 457, 62 L. Ed. 831, 38 S. Ct. 383.

⁷¹ *Merchants Warehouse Co. v. United States* (1931) 283 U. S. 501, 75 L. Ed. 1227, 51 S. Ct. 505.

⁷² *Central R. Co. of New Jersey v. United States* (1921) 257 U. S. 247, 66 L. Ed. 217, 42 S. Ct. 80.

other transportation facilities should be considered on the question of discrimination;⁷³ and on what statutory grounds an advantage produced by a carrier's practice may be considered to be undue discrimination.⁷⁴

§ 461. — Questions Concerning Tariffs.

Judicial questions here include:⁷⁵ whether a tariff is legally part of a through rate;⁷⁶ and whether the commission has power to declare such a rate unreasonable;⁷⁷ and whether a new tariff excluding certain freight creates a changed "classification" within the meaning of the act.⁷⁸

§ 462. Questions Under the Federal Communications Act.

The interpretation of the phrase "public interest" in the Federal Communications Act is for the courts, and as the act cannot be regarded as setting up a standard so indefinite as to confer unlimited power, the courts establish criteria to guide the Federal Communications Commission in its application of the act. The requirement of "public interest, convenience and necessity" is to be interpreted by its context, by the scope, character and quality of the projected services, and by the nature of radio transmission and reception.⁷⁹

§ 463. Questions Under the Federal Trade Commission Act and Related Statutes.

Here judicial questions have been held to include the following: whether a method is a method of competition;⁸⁰ whether a certain act or acts, found to have taken place, constitute an "unfair method of competition";⁸¹ and whether the policy of the Sherman Act is to

⁷³ Interstate Commerce Commission v. Alabama Midland R. Co. (1897) 168 U. S. 144, 42 L. Ed. 414, 18 S. Ct. 45.

⁷⁴ Interstate Commerce Commission v. Dittenbaugh (1911) 222 U. S. 42, 56 L. Ed. 83, 32 S. Ct. 22; Interstate Commerce Commission v. Alabama Midland R. Co. (1897) 168 U. S. 144, 42 L. Ed. 414, 18 S. Ct. 45.

⁷⁵ See also § 474.

⁷⁶ Atchison, T. & S. F. R. Co. v. United States (1929) 279 U. S. 768, 73 L. Ed. 947, 49 S. Ct. 494.

⁷⁷ Atchison, T. & S. F. R. Co. v.

United States (1929) 279 U. S. 768, 73 L. Ed. 947, 49 S. Ct. 494.

⁷⁸ Director-General v. Viscose Co. (1921) 254 U. S. 493, 65 L. Ed. 372, 41 S. Ct. 151.

⁷⁹ Mackay Radio & Telegraph Co. (1938) 68 App. D. C. 336, 97 F. (2d) 641.

⁸⁰ Federal Trade Commission v. Raladam Co. (1931) 283 U. S. 643, 75 L. Ed. 1324, 51 S. Ct. 587, 79 A. L. R. 1191.

⁸¹ Federal Trade Commission.

Federal Trade Commission v. Standard Education Society (1937) 302

be considered in construing the phrase "unfair methods of competition."⁸² Thus if an administrative agency makes valid findings of primary or circumstantial facts, such as findings that certain false

U. S. 112, 82 L. Ed. 141, 58 S. Ct. 113, rehearing denied 302 U. S. 779, 82 L. Ed. 602, 58 S. Ct. 365; Federal Trade Commission v. R. F. Keppel & Bro. (1934) 291 U. S. 304, 78 L. Ed. 814, 54 S. Ct. 423; Federal Trade Commission v. Algoma Lumber Co. (1934) 291 U. S. 67, 78 L. Ed. 655, 54 S. Ct. 315; Federal Trade Commission v. Raymond Bros.-Clark Co. (1924) 263 U. S. 565, 68 L. Ed. 448, 44 S. Ct. 162, 30 A. L. R. 1114; Federal Trade Commission v. Sinclair Refining Co. (1923) 261 U. S. 463, 67 L. Ed. 746, 43 S. Ct. 450; Federal Trade Commission v. Beech-Nut Packing Co. (1922) 257 U. S. 441, 66 L. Ed. 307, 42 S. Ct. 150, 19 A. L. R. 882; Federal Trade Commission v. Gratz (1920) 253 U. S. 421, 64 L. Ed. 993, 40 S. Ct. 572; Federal Trade Commission v. Real Products Corp. (C. C. A. 2d, 1937) 90 F. (2d) 617; James S. Kirk & Co. v. Federal Trade Commission (C. C. A. 7th, 1932) 59 F. (2d) 179, cert. den. 287 U. S. 663, 77 L. Ed. 572, 53 S. Ct. 220; Consolidated Book Publishers, Inc. v. Federal Trade Commission (C. C. A. 7th, 1931) 53 F. (2d) 942, cert. den. (1932) 286 U. S. 553, 76 L. Ed. 1288, 52 S. Ct. 579; Federal Trade Commission v. Good-Grape Co. (C. C. A. 6th, 1930) 45 F. (2d) 70; Federal Trade Commission v. Kay (C. C. A. 7th, 1929) 35 F. (2d) 160, cert. den. (1930) 281 U. S. 764, 74 L. Ed. 1173, 50 S. Ct. 463; Federal Trade Commission v. Balme (C. C. A. 2d, 1928) 23 F. (2d) 615, cert. den. 277 U. S. 598, 72 L. Ed. 1007, 48 S. Ct. 560; Chamber of Commerce v. Federal Trade Commission (C. C. A. 8th, 1926) 13 F. (2d) 673; Procter & Gamble Co. v. Federal Trade Commission (C. C. A. 6th, 1926) 11 F.

(2d) 47, cert. den. 273 U. S. 717, 718, 71 L. Ed. 856, 47 S. Ct. 106.

"The bill which was the foundation of the Act, as it first passed the Senate, declared 'unfair competition' to be unlawful. Debate apparently convinced the sponsors of the legislation that these words, which had a well settled meaning at common law, were too narrow. When the bill came from conference between the two Houses, these words had been eliminated and the words 'unfair methods of competition' substituted. Undoubtedly the substituted phrase has a broader meaning but how much broader has not been determined. It belongs to that class of phrases which do not admit of precise definition, but the meaning and application of which must be arrived at by what this court elsewhere has called 'the gradual process of judicial inclusion and exclusion.' Davidson v. New Orleans, 96 U. S. 97, 104. The question is one for the final determination of the courts and not of the Commission. Federal Trade Comm. v. Gratz, 253 U. S. 421, 427; Federal Trade Comm. v. Beech-Nut Co., supra, p. 453." (Mr. Justice Sutherland in Federal Trade Commission v. Raladam Co. (1931) 283 U. S. 643, 648, 75 L. Ed. 1324, 51 S. Ct. 587, 79 A. L. R. 1191.)

The President.

See A. L. A. Schechter Poultry Corp. v. United States (1935) 295 U. S. 495, 79 L. Ed. 1570, 55 S. Ct. 837, 97 A. L. R. 947.

⁸² Federal Trade Commission v. Beech-Nut Packing Co. (1922) 257 U. S. 441, 66 L. Ed. 307, 42 S. Ct. 150, 19 A. L. R. 882.

representations were made, it does not necessarily follow as a matter of law that the making of every false representation is an unfair method of competition. That question is a judicial one for decision by the courts.⁸³

§ 464. Questions Under the National Labor Relations Act.

Under this act the following have been held to be judicial questions: whether an employer's action affects interstate or foreign commerce in such a close and intimate fashion as to be subject to federal control;⁸⁴ whether the act provides for judicial review of a particular order;⁸⁵ whether one is an "employee,"⁸⁶ "employer,"⁸⁷ or an "agricultural laborer"⁸⁸ within the meaning of the act; what constitutes "collective bargaining";⁸⁹ a "labor dispute,"⁹⁰ "refusal to bargain"⁹¹ and "evidence"⁹² within the meaning of the act.

⁸³ Federal Trade Commission v. Standard Education Society (1937) 302 U. S. 112, 82 L. Ed. 141, 58 S. Ct. 113, rehearing denied 302 U. S. 779, 82 L. Ed. 602, 58 S. Ct. 365.

⁸⁴ Consolidated Edison Co. v. National Labor Relations Board (1938) 305 U. S. 197, 83 L. Ed. 126, 59 S. Ct. 206.

⁸⁵ American Federation of Labor v. National Labor Relations Board (1940) 308 U. S. 401, 84 L. Ed. 347, 60 S. Ct. 300. See also § 632 et seq.

⁸⁶ National Labor Relations Board v. Fansteel Metallurgical Corp. (1939) 306 U. S. 240, 83 L. Ed. 627, 59 S. Ct. 490, 123 A. L. R. 599; North Whittier Heights Citrus Ass'n v. National Labor Relations Board (C. C. A. 9th, 1940) 109 F. (2d) 76, cert. den. 310 U. S. 632, 84 L. Ed. 1402, 60 S. Ct. 1075; *National Labor Relations Board v. Biles Coleman Lumber Co. (C. C. A. 9th, 1938) 98 F. (2d) 18; Mooresville Cotton Mills v. National Labor Relations Board (C. C. A. 4th, 1938) 97 F. (2d) 959; Mooresville Cotton Mills v. National Labor Relations Board (C. C. A. 4th, 1938) 94 F. (2d) 61; Jeffery-De Witt Insulator Co. v. National Labor Relations Board (C.

C. A. 4th, 1937) 91 F. (2d) 134, 112 A. L. R. 948, cert. den. 302 U. S. 731, 82 L. Ed. 565, 58 S. Ct. 55.

⁸⁷ National Labor Relations Board v. Lund (C. C. A. 8th, 1939) 103 F. (2d) 815.

⁸⁸ North Whittier Heights Citrus Ass'n v. National Labor Relations Board (C. C. A. 9th, 1940) 109 F. (2d) 76, cert. den. 310 U. S. 632, 84 L. Ed. 1402, 60 S. Ct. 1075.

⁸⁹ National Labor Relations Board v. Biles Coleman Lumber Co. (C. C. A. 9th, 1938) 98 F. (2d) 18.

⁹⁰ National Labor Relations Board v. Stackpole Carbon Co. (C. C. A. 3d, 1939) 105 F. (2d) 167, cert. den. 308 U. S. 605, 84 L. Ed. 506, 60 S. Ct. 142.

⁹¹ National Labor Relations Board v. National Casket Co., Inc. (C. C. A. 2d, 1939) 107 F. (2d) 992; National Labor Relations Board v. National Motor Bearing Co. (C. C. A. 9th, 1939) 105 F. (2d) 652; Globe Cotton Mills v. National Labor Relations Board (C. C. A. 5th, 1939) 103 F. (2d) 91.

⁹² Consolidated Edison Co. v. National Labor Relations Board (1938) 305 U. S. 197, 83 L. Ed. 126, 59 S. Ct.

§ 465. Questions Under the Railway Labor Act.

Whether "organization of employees" includes labor unions is a judicial question,⁹³ as is the question whether one is an "employee" within the meaning of the act.⁹⁴

§ 466. Questions Under the Packers and Stockyards Act.

Whether practices of marketing agencies in the livestock trade found to exist and condemned by the Secretary of Agriculture constituted unfair trade practices under the Packers and Stockyards Act is a judicial question.⁹⁵

§ 467. Questions Under the Postal Laws.

Whether a publication is a "book" or a "periodical" under the Postal Laws is a judicial question.⁹⁶

§ 468. Questions Under the Public Land Acts.

Whether lands never were public property, whether they have previously been disposed of, whether Congress has made no provision for their sale, whether Congress has reserved them, and various questions of substantive law, consisting chiefly of the construction of terms in the Public Land Acts, are judicial questions.⁹⁷ Likewise are included the questions whether a claimant must show the non-mineral character of the lands claimed,⁹⁸ and whether a railroad may select coal lands as lien lands.⁹⁹

§ 469. Questions Under Various Revenue Laws.

Where the statute provides for a "reasonable" allowance for depletion, in fixing assessments, the question whether the formula employed by the taxing officer to compute depletion allowance is reason-

206; *C. G. Conn, Ltd. v. National Labor Relations Board* (C. C. A. 7th, 1939) 108 F. (2d) 390; *National Labor Relations Board v. Bell Oil & Gas Co.* (C. C. A. 5th, 1938) 98 F. (2d) 406.

⁹³ *Pennsylvania R. Co. v. United States Railroad Labor Board* (1923) 261 U. S. 72, 67 L. Ed. 536, 43 S. Ct. 278.

⁹⁴ *Nashville, C. & St. L. Ry. v. Railway Employees' Dep't of A. F. of L.* (C. C. A. 6th, 1937) 93 F. (2d)

340, cert. den. (1938) 303 U. S. 649, 82 L. Ed. 1110, 58 S. Ct. 746.

⁹⁵ *United States v. Donahue Bros., Inc.* (C. C. A. 8th, 1932) 59 F. (2d) 1019.

⁹⁶ See § 270.

⁹⁷ See § 268.

⁹⁸ *Work v. Louisiana* (1925) 269 U. S. 250, 70 L. Ed. 259, 46 S. Ct. 92.

⁹⁹ **Santa Fe P. R. Co. v. Work* (1925) 267 U. S. 511, 69 L. Ed. 764, 45 S. Ct. 400.

able, is a judicial question.¹ Where the statute provides a different tax for associations engaged in business from that for trusts, the reasonableness of the standard of classification is a question of law, although whether a trust suits the standard is an administrative question.² Where the jurisdiction of the Board of Tax Appeals depends upon the filing of a petition by a taxpayer, the meaning of "filing" is a judicial question.³

§ 470. Questions Under the Tariff Acts.

Whether practices found by the Tariff Commission to exist constitute unfair methods of competition and unfair acts in the importation of articles, within the meaning of the statute, is a judicial question.⁴ Whether a patent is valid is a judicial question.⁵

§ 471. Questions Under Workmen's Compensation Acts.

Judicial questions of statutory construction under various workmen's compensation Acts include: under the Longshoremen's and Harbor Workers' Compensation Act, what is included under the term, "dry dock";⁶ whether a longshoreman engaged on a vessel at a dock in navigable waters is a "seaman";⁷ and whether a common-law wife can become a "widow" within the meaning of the Employees' Compensation Acts.⁸

§ 472. State Statutes.

Whether a state statute, which provides that rates may be changed with the consent of the state commission, permits a change of contract rates by filing a new schedule with the consent of the commission and no further administrative action, is a judicial question.⁹ Whether

¹ *Murphy Oil Co. v. Burnet* (1932) 287 U. S. 299, 77 L. Ed. 318, 53 S. Ct. 161.

² *Commissioner of Internal Revenue v. Vandegrift Realty & Investment Co.* (C. C. A. 9th, 1936) 82 F. (2d) 387.

³ *Lewis-Hall Iron Works v. Blair* (1928) 57 App. D. C. 364, 23 F. (2d) 972, cert. den. 277 U. S. 592, 72 L. Ed. 1004, 48 S. Ct. 529.

⁴ *Frisher & Co., Inc. v. Bakelite Corp.* (Ct. Cust. & Pat. App. 1930) 39 F. (2d) 247, cert. den. 282 U. S. 852, 75 L. Ed. 755, 51 S. Ct. 29.

⁵ *Frisher & Co., Inc. v. Bakelite Corp.* (Ct. Cust. & Pat. App. 1930) 39 F. (2d) 247, cert. den. 282 U. S. 852, 75 L. Ed. 755, 51 S. Ct. 29.

⁶ *Norton v. Vesta Coal Co.* (C. C. A. 3d, 1933) 63 F. (2d) 165.

⁷ *South Chicago Coal & Dock Co. v. Bassett* (1940) 309 U. S. 251, 84 L. Ed. 732, 60 S. Ct. 544.

⁸ *Keyway Stevedoring Co. v. Clark* (D. C. D. Md. 1930) 43 F. (2d) 983.

⁹ *Wichita Railroad & Light Co. v. Public Utilities Commission* (1922) 260 U. S. 48, 67 L. Ed. 124, 43 S. Ct. 51.

a state statute requires a state agency to approve a stock issue is a judicial question,¹⁰ as is the effect of the repeal of state statutory provisions.¹¹

C. Construction of Documents

§ 473. In General.

Judicial questions also include questions of construction of documents other than statutes and the writings of administrative agencies.¹² These documents include contracts,¹³ including city ordinances embodying the terms of a contract with a utility,¹⁴ tariffs,¹⁵ the rules of a carrier,¹⁶ wills,¹⁷ newspaper articles,¹⁸ and treaties.¹⁹

¹⁰ Federal Communications Commission v. Pottsville Broadcasting Co. (1940) 309 U. S. 134, 84 L. Ed. 656, 60 S. Ct. 437.

¹¹ Bohler v. Callaway (1925) 267 U. S. 479, 69 L. Ed. 745, 45 S. Ct. 431.

¹² Alien Cases.

Karnuth v. United States (1929) 279 U. S. 231, 73 L. Ed. 677, 49 S. Ct. 274; McCandless v. United States ex rel. Diabo (C. C. A. 3d, 1928) 25 F. (2d) 71.

Board of Tax Appeals.

Lucas v. Mercantile Trust Co. (C. C. A. 8th, 1930) 43 F. (2d) 39.

Comptroller of the Treasury.

See Southern Pac. Co. v. United States (1939) 307 U. S. 393, 83 L. Ed. 1363, 59 S. Ct. 923.

Federal Trade Commission.

Federal Trade Commission v. Curtis Pub. Co. (1923) 260 U. S. 568, 67 L. Ed. 408, 43 S. Ct. 210.

Interstate Commerce Commission.

Southern R. Co. v. Campbell (1915) 239 U. S. 99, 60 L. Ed. 165, 36 S. Ct. 33.

National Labor Relations Board.

National Licorice Co. v. National Labor Relations Board (1940) 309 U. S. 350, 84 L. Ed. 799, 60 S. Ct. 569.

Postmaster-General.

United States ex rel. Milwaukee Social Democratic Pub. Co. v. Burleson (1921) 255 U. S. 407, 65 L. Ed. 704, 41 S. Ct. 352.

State Agencies.

Missouri, K. & T. Ry. Co. v. Oklahoma (1926) 271 U. S. 303, 70 L. Ed. 957, 46 S. Ct. 517.

¹³ National Licorice Co. v. National Labor Relations Board (1940) 309 U. S. 350, 84 L. Ed. 799, 60 S. Ct. 569; Federal Trade Commission v. Curtis Pub. Co. (1923) 260 U. S. 568, 67 L. Ed. 408, 43 S. Ct. 210; *Delaware & H. R. Corp. v. United States (D. C. M. D. Pa., 1937) 19 F. Supp. 700.

¹⁴ Missouri, K. & T. Ry. Co. v. Oklahoma (1926) 271 U. S. 303, 70 L. Ed. 957, 46 S. Ct. 517.

¹⁵ See § 474.

¹⁶ Southern R. Co. v. Campbell (1915) 239 U. S. 99, 60 L. Ed. 165, 36 S. Ct. 33.

¹⁷ Lucas v. Mercantile Trust Co. (C. C. A. 8th, 1930) 43 F. (2d) 39.

¹⁸ United States ex rel. Milwaukee Social Democratic Pub. Co. v. Burleson (1921) 255 U. S. 407, 65 L. Ed. 704, 41 S. Ct. 352.

¹⁹ Karnuth v. United States (1929) 279 U. S. 231, 73 L. Ed. 677, 49 S. Ct. 274; McCandless v. United States ex rel. Diabo (C. C. A. 3rd, 1928) 25 F. (2d) 71.

A settled administrative interpretation of an ambiguous statute which has by reason of compliance become a contract, may have decided weight in construction.²⁰

§ 474. Construction of Tariffs: May Be Either Judicial or Administrative Questions.

Construction of a tariff is a judicial question insofar as words are used in their ordinary meaning.²¹ Preliminary resort to the administrative agency is not necessary where the words are used in their ordinary meaning, since administrative considerations are not in-

²⁰ Southern Pac. Co. v. United States (1939) 307 U. S. 393, 83 L. Ed. 1363, 59 S. Ct. 923. See § 475 et seq.
²¹ Interstate Commerce Commission.

* W. P. Brown & Sons Lumber Co. v. Louisville & N. R. Co. (1937) 299 U. S. 393, 81 L. Ed. 301, 57 S. Ct. 265; Standard Oil Co. v. United States (1931) 283 U. S. 235, 75 L. Ed. 999, 51 S. Ct. 429; United States v. Gulf Refining Co. (1925) 268 U. S. 542, 69 L. Ed. 1082, 45 S. Ct. 597; * Great Northern R. Co. v. Merchants Elevator Co. (1922) 259 U. S. 285, 66 L. Ed. 943, 42 S. Ct. 477; St. Louis, I. M. & S. R. Co. v. J. F. Hasty & Sons (1921) 255 U. S. 252, 65 L. Ed. 614, 41 S. Ct. 269; Texas & P. R. Co. v. Sonken-Galamba Corp. (C. C. A. 5th, 1938) 100 F. (2d) 158, cert. den. 306 U. S. 655, 83 L. Ed. 1053, 59 S. Ct. 644; Atchison, T. & S. F. R. Co. v. United States ex rel. Sonken-Galamba Corp. (C. C. A. 8th, 1938) 98 F. (2d) 457; Hygrade Food Products Corp. v. Chicago, M., St. P. & P. R. Co. (C. C. A. 2d, 1936) 85 F. (2d) 113; Norge Corp. v. Long Island R. Co. (C. C. A. 2d, 1935) 77 F. (2d) 312, cert. den. 296 U. S. 616, 80 L. Ed. 437, 56 S. Ct. 137; Chicago Great Western R. Co. v. Farmers' Shipping Ass'n (C. C. A. 10th, 1932) 59 F. (2d) 657; Southern Ry. Co. v. Eichler (C. C. A. 8th, 1932) 56 F. (2d) 1010; Great Northern Ry. Co. v. Armour & Co. (D. C. N. D. Ill., E. Div., 1939) 26 F. Supp. 964.

United States Shipping Board.

United States Nav. Co., Inc. v. Cunard S. S. Co., Ltd. (1932) 284 U. S. 474, 76 L. Ed. 408, 52 S. Ct. 247.

Quotations.

"First. The rule declares that the prescribed formula is to be applied 'where no published through rates are in effect from point of origin to destination.' The language used is not technical. The meaning of the words is clear. There is no ambiguity. The construction of these railroad tariffs presents, therefore, a question of law, not differing in character from those presented when the construction of any other document is in dispute. Great Northern Ry. Co. v. Merchants Elevator Co., 259 U. S. 285, 291. As, in each instance, there was available some through route from point of origin to destination for which joint through rates had been published, the rule, by its terms, has no application. We so hold despite the construction given to the rule by the Commission." (Mr. Justice Brandeis in *W. P. Brown & Sons Lumber Co. v. Louisville & N. R. Co.* (1937) 299 U. S. 393, 397, 398, 81 L. Ed. 301, 57 S. Ct. 265.)

"Here no fact, evidential or ultimate, is in controversy; and there is no occasion for the exercise of administrative discretion. The task to be performed is to determine the meaning of words of the tariff which

volved,²² and previous administrative construction is not binding on the courts.²³ If the parties preserve their rights, construction given by a court may ultimately be reviewed by the Supreme Court, and thereby assure uniformity in construction on questions of law.²⁴ Thus where a tariff imposes a charge for reconsignment, and excepts cars held for disposition orders, whether disposition orders may be orders to make disposition by way of reconsignment to another destination, is a judicial question.²⁵ Whether the words "rough material" in a tariff include "rough heading," used to manufacture barrel-heads, is a judicial question.²⁶

But where the words of a written instrument are used, not in their ordinary meaning, but in a peculiar meaning, preliminary determination must be made by an administrative agency. This is true where technical words or phrases not commonly understood are employed. Extrinsic evidence may be necessary to determine their meaning.²⁷ Or extrinsic evidence may be necessary to establish the usage of a trade or locality which attaches provisions not expressed in the language of the instrument.²⁸ And where the meaning of words in a

were used in their ordinary sense and to apply that meaning to the undisputed facts. That operation was solely one of construction; and preliminary resort to the Commission was, therefore, unnecessary. . . . If in examining the cases referred to there is borne in mind the distinction above discussed between controversies which involve only questions of law and those which involve issues essentially of fact or call for the exercise of administrative discretion, it will be found that the conflict described does not exist and that the decisions referred to are in harmony also with reason." (Mr. Justice Brandeis in *Great Northern Ry. Co. v. Merchants Elevator Co.* (1922) 259 U. S. 285, 294, 295, 296, 66 L. Ed. 943, 42 S. Ct. 477.)

²² *W. P. Brown & Sons Lumber Co. v. Louisville & N. R. Co.* (1937) 299 U. S. 393, 81 L. Ed. 301, 57 S. Ct. 265, overruling *Baltimore & O. R. Co. v. Domestic Hardwoods, Inc.* (1933) 62 App. D. C. 142, 65 F. (2d) 488, cert. den. 290 U. S. 647, 78 L. Ed.

561, 54 S. Ct. 64; * *Great Northern R. Co. v. Merchants Elevator Co.* (1922) 259 U. S. 285, 66 L. Ed. 943, 42 S. Ct. 477; *St. Louis, I. M. & S. R. Co. v. J. F. Hasty & Sons* (1921) 255 U. S. 252, 65 L. Ed. 614, 41 S. Ct. 269; *Sullivan v. Missouri Pac. Lines* (D. C. W. D. Tex., San Antonio Div., 1931) 1 F. Supp. 803.

²³ *W. P. Brown & Sons Lumber Co. v. Louisville & N. R. Co.* (1937) 299 U. S. 393, 81 L. Ed. 301, 57 S. Ct. 265.

²⁴ * *Great Northern R. Co. v. Merchants Elevator Co.* (1922) 259 U. S. 285, 66 L. Ed. 943, 42 S. Ct. 477.

²⁵ * *Great Northern R. Co. v. Merchants Elevator Co.* (1922) 259 U. S. 285, 66 L. Ed. 943, 42 S. Ct. 477.

²⁶ *St. Louis, I. M. & S. R. Co. v. J. F. Hasty & Sons* (1921) 255 U. S. 252, 65 L. Ed. 614, 41 S. Ct. 269.

²⁷ * *Great Northern R. Co. v. Merchants Elevator Co.* (1922) 259 U. S. 285, 66 L. Ed. 943, 42 S. Ct. 477.

²⁸ * *Great Northern R. Co. v. Merchants Elevator Co.* (1922) 259 U. S. 285, 66 L. Ed. 943, 42 S. Ct. 477.

tariff involves no question of construction, but the dispute is whether words are used in their ordinary or their technical meaning, or where the tariff is silent as to a question calling for the exercise of administrative judgment, the question is an administrative question.²⁹ Where the construction of a tariff requires consideration of voluminous and complicated evidence as to administrative matters, the proper determination of such matters calls for the trained judgment commonly found only in a body of experts. And uniformity on such matters can be secured only if the determination is left to the agency.³⁰ Hence where such matters are involved the question of construction becomes an administrative question subject to the primary jurisdiction doctrine and the doctrine of administrative finality.³¹

Hence construction of a tariff becomes an administrative question if it involves the exercise of sound administrative discretion as to technical and intricate matters of tariff application or the relation of tariffs one to another;³² an appreciation of the incidents ordinarily affecting the use of a tariff;³³ the reasonableness of a practice of routing as between higher and lower rated routes,³⁴ or uniformity in the application of rates.³⁵ Thus the issue

²⁹ * *Great Northern R. Co. v. Merchants Elevator Co.* (1922) 259 U. S. 285, 66 L. Ed. 943, 42 S. Ct. 477; *Norge Corp. v. Long Island R. Co.* (C. C. A. 2d, 1935) 77 F. (2d) 312, cert. den. 296 U. S. 616, 80 L. Ed. 437, 56 S. Ct. 137.

³⁰ *Standard Oil Co. v. United States* (1931) 283 U. S. 235, 75 L. Ed. 999, 51 S. Ct. 429; *Great Northern R. Co. v. Merchants Elevator Co.* (1922) 259 U. S. 285, 66 L. Ed. 943, 42 S. Ct. 477.

³¹ *Interstate Commerce Commission.*

W. P. Brown & Sons Lumber Co. v. Louisville & N. R. Co. (1937) 299 U. S. 393, 81 L. Ed. 301, 57 S. Ct. 265; *Standard Oil Co. v. United States* (1931) 283 U. S. 235, 75 L. Ed. 999, 51 S. Ct. 429; * *Great Northern R. Co. v. Merchants Elevator Co.* (1922) 259 U. S. 285, 66 L. Ed. 943, 42 S. Ct. 477; *Norge Corp. v. Long Island R. Co.* (C. C. A. 2d, 1935) 77 F. (2d) 312, cert. den. 296 U. S. 616, 80 L. Ed. 437, 56 S. Ct. 137; *United*

States ex rel. Kroger Grocery & Baking Co. v. Interstate Commerce Commission (1934) 64 App. D. C. 43, 73 F. (2d) 948, cert. den. (1935) 294 U. S. 712, 79 L. Ed. 1246, 55 S. Ct. 508.

³² *W. P. Brown & Sons Lumber Co. v. Louisville & N. R. Co.* (1937) 299 U. S. 393, 81 L. Ed. 301, 57 S. Ct. 265. See *United States Nav. Co., Inc. v. Cunard S. S. Co., Ltd.* (1932) 284 U. S. 474, 76 L. Ed. 408, 52 S. Ct. 247.

³³ *United States ex rel. Kroger Grocery & Baking Co. v. Interstate Commerce Commission* (1934) 64 App. D. C. 43, 73 F. (2d) 948, cert. den. (1935) 294 U. S. 712, 79 L. Ed. 1246, 55 S. Ct. 508.

³⁴ *W. P. Brown & Sons Lumber Co. v. Louisville & N. R. Co.* (1937) 299 U. S. 393, 81 L. Ed. 301, 57 S. Ct. 265.

³⁵ *W. P. Brown & Sons Lumber Co. v. Louisville & N. R. Co.* (1937) 299 U. S. 393, 81 L. Ed. 301, 57 S. Ct. 265; *United States Nav. Co., Inc. v.*

may be whether the word "lumber" in a tariff was used in a peculiar sense, so as to include, by the usage of the trade, oak ties. The question, upon which the views of men in the trade were in irreconcilable conflict, was one of fact which, unlike one of construction, could not ultimately be settled by the Supreme Court. Preliminary resort to the Interstate Commerce Commission was necessary to insure uniformity.³⁶ Or the question may not require the consideration of voluminous conflicting evidence, but may involve the exercise of administrative judgment, as when a tariff is silent on the subject of whether shipper or carrier should furnish inside doors and bulkheads on cars of grain, fruits and vegetables. The controverted question is not how the tariff should be construed, but what character of equipment should be deemed reasonable.³⁷

However, even if consideration of administrative matters is necessary, construction of a tariff becomes an administrative question only to the extent that those matters are involved, and it remains a judicial question as to all other questions of construction.³⁸

A statutory scheme negatives any inference that construction of a particular tariff is necessarily an administrative question, where the statute's procedural provisions permit direct application to the courts for construction without preliminary resort to the administrative agency, as by suit for damages under the Interstate Commerce Act.³⁹

Gunard S. S. Co., Ltd. (1932) 284 U. S. 474, 76 L. Ed. 408, 52 S. Ct. 247; *Norge Corp. v. Long Island R. Co.* (C. C. A. 2d, 1935) 77 F. (2d) 312, cert. den. 296 U. S. 616, 80 L. Ed. 437, 56 S. Ct. 137.

³⁶ * *Great Northern R. Co. v. Merchants Elevator Co.* (1922) 259 U. S. 285, 66 L. Ed. 943, 42 S. Ct. 477.

³⁷ * *Great Northern R. Co. v. Mer-*

chants Elevator Co. (1922) 259 U. S. 285, 66 L. Ed. 943, 42 S. Ct. 477.

³⁸ *W. P. Brown & Sons Lumber Co. v. Louisville & N. R. Co.* (1937) 299 U. S. 393, 81 L. Ed. 301, 57 S. Ct. 265.

³⁹ 49 USCA 8 and 9. *W. P. Brown & Sons Lumber Co. v. Louisville & N. R. Co.* (1937) 299 U. S. 393, 81 L. Ed. 301, 57 S. Ct. 265.

CHAPTER 28

WEIGHT OF ADMINISTRATIVE DECISION OF JUDICIAL QUESTIONS: ADMINISTRATIVE CONSTRUCTION

- § 475. In General.
- § 476. Administrative Construction in General.
- § 477. What Constitutes an Administrative Construction.
- § 478. First Rule: Administrative Construction Never Material if Plainly Erroneous or Meaning of Statute Is Clear.
- § 479. Second Rule: Settled Administrative Construction of Ambiguous Statute Is of Persuasive Force.
- § 480. —Additional Weight Where Affirmative Indications of Legislative Approval.
- § 481. —Administrative Construction Must Be Settled and Receive Acquiescence.
- § 482. —Reasons for Rule.
- § 483. Third Rule: Settled Construction of Ambiguous Statute Reenacted Without Material Change Presumed to Be Ratified by Congress.
- § 484. —What Constitutes "Material Change."
- § 485. —Conditions Must Be Similar Upon Reenactment.
- § 486. —Administrative Construction Must Be Settled Prior to Reenactment.
- § 487. Statutory Incorporation of Construction.
- § 488. Change in Administrative Construction.

§ 475. In General.

This chapter should be read in connection with the succeeding chapter on judicial review of administrative regulations.¹

Ordinarily an administrative decision of a judicial question carries no weight.² A practical situation caused by the very nature of administrative machinery, however, has given rise to an exception to this rule. This situation arises where, due to the continuing nature of administrative machinery and the absence of judicial initiative, an agency administers a statute over a period of time during which no judicial construction of the statute is obtained.³ In this circumstance an administrative agency often ventures its decision on a judicial question, that is, construction of the statute, unguided by the courts in which the judicial power reposes.⁴ Often an administrative construction of the statute continues unchanged for a substantial period,

¹ See § 489 et seq.

² See §§ 41, 73, 425 et seq.

³ See § 73.

⁴ Compare § 449 et seq.

and may receive the acquiescence of interested parties before judicial construction is obtained. This is the situation which has given rise to an exception to the general rule which accords no weight to an administrative decision of a judicial question. As will be seen, this exception gives substantial weight to such an administrative construction where the statute is ambiguous or the construction permissible, and even greater weight where the statute has been reenacted in the face of a settled administrative construction. For a proper understanding of these rules the nature of administrative construction should be understood.

§ 476. Administrative Construction in General.

The phrase "administrative construction" ordinarily refers to an interpretation by an administrative agency of an ambiguous statute, contract arising out of a statute,⁵ or treaty.⁶ Interpretation by an agency of its own writings is discussed elsewhere.⁷

§ 477. What Constitutes an Administrative Construction.

An administrative construction must always be clearly shown to exist to be of any significance. Above all it must be disclosed to the public in order to demonstrate that the agency has taken a definite position. Congress is presumed to be familiar with an administrative construction which is disclosed to the public.⁸ But it is not presumed to be familiar with an administrative construction which is not disclosed to the public, and in that event no legislative approval can be inferred.⁹ An administrative construction of a statute may be disclosed by interpretative regulations promulgated by the agency which are unambiguous,¹⁰ by administrative rulings,¹¹ and by an agency's

⁵ *Southern Pac. Co. v. United States* (1939) 307 U. S. 393, 83 L. Ed. 1363, 59 S. Ct. 923; *Boyett v. United States* (C. C. A. 5th, 1936) 86 F. (2d) 66.

⁶ *Cook v. United States* (1933) 288 U. S. 102, 77 L. Ed. 641, 53 S. Ct. 305; *Luckenbach S. S. Co. v. United States* (1930) 280 U. S. 173, 74 L. Ed. 356, 50 S. Ct. 148.

⁷ See § 443 et seq.

⁸ *National Lead Co. v. United States* (1920) 252 U. S. 140, 64 L. Ed. 496, 40 S. Ct. 237.

⁹ *Estate of Sanford v. Commis-*

sioner of Internal Revenue (1939) 308 U. S. 39, 84 L. Ed. 20, 60 S. Ct. 51, rehearing denied 308 U. S. 637, 84 L. Ed. 529, 60 S. Ct. 258. See also § 483.

¹⁰ See § 489 et seq. It is essential that distinction be drawn between legislative and interpretative regulations. Only the latter constitute an "administrative construction."

¹¹ *Estate of Sanford v. Commissioner of Internal Revenue* (1939) 308 U. S. 39, 84 L. Ed. 20, 60 S. Ct. 51, rehearing denied 308 U. S. 637, 84 L. Ed. 529, 60 S. Ct. 258; *Burnet*

practice.¹² An administrative practice must appear plainly to the court in order to constitute an interpretation of a statute.¹³

An administrative construction may not be established by mere inaction by an agency, as by failure to institute proceedings.¹⁴ Similarly inaction of the Treasury by acquiescence in a Supreme Court decision does not constitute a controlling administrative practice which could prevent the Court from reexamining the question and reversing itself.¹⁵

An administrative ruling does not constitute an interpretation of a statute where the ruling is not enforced and is contrary to the practice of interested parties.¹⁶

Administrative construction of a statute should never be confused with a finding on an administrative question, regardless of label. Thus not every administrative practice is a "construction." Those based on a factual determination, that is, a determination of an administrative question, have no relation to construction. So it is said that an administrative practice based upon a mistake of fact is not an ad-

v. S. & L. Building Corp. (1933) 288 U. S. 406, 77 L. Ed. 861, 53 S. Ct. 428.

12 Alien Cases.

Lloyd Royal Belge Societe Anonyme v. Elting (C. C. A. 2d, 1932) 61 F. (2d) 745, cert. den. 289 U. S. 730, 77 L. Ed. 1479, 53 S. Ct. 526.

Coast Guard.

Cook v. United States (1933) 288 U. S. 102, 77 L. Ed. 641, 53 S. Ct. 305.

Commissioner of Internal Revenue.

Estate of Sanford v. Commissioner of Internal Revenue (1939) 308 U. S. 39, 84 L. Ed. 20, 60 S. Ct. 51, rehearing denied 308 U. S. 637, 84 L. Ed. 529, 60 S. Ct. 258.

Interstate Commerce Commission.

United States v. Chicago, N. S. & M. R. Co. (1933) 288 U. S. 1, 77 L. Ed. 583, 53 S. Ct. 245; Interstate Commerce Commission v. New York, N. H. & H. R. Co. (1932) 287 U. S. 178, 77 L. Ed. 248, 53 S. Ct. 106; Louisville & N. R. Co. v. United States (1931) 282 U. S. 740, 75 L. Ed. 672, 51 S. Ct. 297.

Superintendent of Licenses (District of Columbia).

Coombe v. United States ex rel. Selis (1925) 55 App. D. C. 190, 3 F. (2d) 714.

Tariff Commission.

Norwegian Nitrogen Products Co. v. United States (1933) 288 U. S. 294, 77 L. Ed. 796, 53 S. Ct. 350.

13 Estate of Sanford v. Commissioner of Internal Revenue (1939) 308 U. S. 39, 84 L. Ed. 20, 60 S. Ct. 51, rehearing denied 308 U. S. 637, 84 L. Ed. 529, 60 S. Ct. 258; United States v. Chicago, N. S. & M. R. Co. (1933) 288 U. S. 1, 77 L. Ed. 583, 53 S. Ct. 245; United States v. Missouri Pac. R. Co. (1929) 278 U. S. 269, 73 L. Ed. 322, 49 S. Ct. 133.

14 Union Stock Yard & Transit Co. v. United States (1939) 308 U. S. 213, 84 L. Ed. 198, 60 S. Ct. 193.

15 Helvering v. Hallock (1940) 309 U. S. 106, 84 L. Ed. 604, 60 S. Ct. 444, 125 A. L. R. 1368.

16 United States v. Erie R. Co. (1915) 236 U. S. 259, 59 L. Ed. 567, 35 S. Ct. 396.

ministrative construction.¹⁷ The fact that the post-office paid the full rate to a railroad instead of the sums due to a land-grant road, under the impression that it was not a land-grant road, does not constitute administrative construction.¹⁸

Administrative construction of a statute by an agency not specifically charged with administering the statute, is of no significance.¹⁹ Similarly construction of the rules of the Senate by the Executive Department is of no particular significance.²⁰

A party subject to administrative proceedings is entitled to whatever rights may be afforded him by the administrative construction of the agency then effective. Thus one under investigation with a view to deportation is legally entitled to insist upon the observance of rules promulgated by the Secretary of Labor pursuant to law.²¹

The weight to be given to an administrative construction is always a judicial question.²²

§ 478. First Rule: Administrative Construction Never Material if Plainly Erroneous or Meaning of Statute Is Clear.

Where the meaning of a statute is clear and unambiguous an administrative construction thereof is not material and has no persuasive force.²³ An administrative construction inconsistent or out of harmony with a clear and unambiguous statute cannot be given weight for to do so would amend the statute.²⁴ A statute may not be amended or changed even by joint resolution of Congress.²⁵ Hence an administrative construction has no weight where it conflicts with a statute whose meaning is plain on its face so that there is no room for

¹⁷ *Grand Trunk Western Ry. Co. v. United States* (1920) 252 U. S. 112, 64 L. Ed. 484, 40 S. Ct. 309.

¹⁸ *Grand Trunk Western Ry. Co. v. United States* (1920) 252 U. S. 112, 64 L. Ed. 484, 40 S. Ct. 309.

¹⁹ *Alaska S. S. Co. v. United States* (1933) 290 U. S. 256, 78 L. Ed. 302, 54 S. Ct. 159.

²⁰ *United States v. Smith* (1932) 286 U. S. 6, 76 L. Ed. 954, 52 S. Ct. 475.

²¹ *United States ex rel. Bilokumsky v. Tod* (1923) 263 U. S. 149, 68 L. Ed. 221, 44 S. Ct. 54.

²² *Work v. Louisiana* (1925) 269 U. S. 250, 70 L. Ed. 259, 46 S. Ct. 92.

²³ *Hewitt v. Schultz* (1901) 180 U. S. 139, 45 L. Ed. 463, 21 S. Ct. 309; *Walker v. United States* (C. C. A. 8th, 1936) 83 F. (2d) 103; *Burnet v. Marston* (1932) 61 App. D. C. 91, 57 F. (2d) 611.

²⁴ *Koshland v. Helvering* (1936) 298 U. S. 441, 80 L. Ed. 1268, 56 S. Ct. 767, 105 A. L. R. 756.

²⁵ *Ann Arbor R. Co. v. United States* (1930) 281 U. S. 658, 74 L. Ed. 1098, 50 S. Ct. 444.

construction,²⁶ with a statute as judicially construed,²⁷ or where it is plainly erroneous.²⁸ This is an ironbound rule, unvaried even if the administrative construction is well settled, or if the statute has meanwhile been reenacted by Congress since no legislative approval of an administrative construction can be implied from reenactment of an unambiguous provision.²⁹

§ 479. Second Rule: Settled Administrative Construction of Ambiguous Statute Is of Persuasive Force.

Where an act uses ambiguous terms or is of doubtful construction, a clarifying regulation, or a settled construction indicating the method of its application to specific cases, which embodies the practical interpretation of the statute by the department or agency charged with its administration, is entitled to great weight by the courts unless there are cogent reasons for rejecting it.³⁰ It is not

26 Commissioner of Internal Revenue.

Haggar Co. v. Helvering (1940) 308 U. S. 389, 84 L. Ed. 340, 60 S. Ct. 337; Estate of Sanford v. Commissioner of Internal Revenue (1939) 308 U. S. 39, 84 L. Ed. 20, 60 S. Ct. 51, rehearing denied 308 U. S. 637, 84 L. Ed. 529, 60 S. Ct. 258; Helvering v. Winmill (1938) 305 U. S. 79, 83 L. Ed. 52, 59 S. Ct. 45.

Comptroller-General.

Miguel v. McCarl (1934) 291 U. S. 442, 78 L. Ed. 901, 54 S. Ct. 465; Alaska S. S. Co. v. United States (1933) 290 U. S. 256, 78 L. Ed. 302, 54 S. Ct. 159.

Interstate Commerce Commission.

Texas & Pac. R. Co. v. United States (1933) 289 U. S. 627, 77 L. Ed. 1410, 53 S. Ct. 768.

Postmaster-General.

Houghton v. Payne (1904) 194 U. S. 88, 48 L. Ed. 888, 24 S. Ct. 590.

Secretary of the Interior.

See Hewitt v. Schultz (1901) 180 U. S. 139, 45 L. Ed. 463, 21 S. Ct. 309.

²⁷ Estate of Sanford v. Commissioner of Internal Revenue (1939) 308 U. S. 39, 84 L. Ed. 20, 60 S. Ct.

51, rehearing denied 308 U. S. 637, 84 L. Ed. 529, 60 S. Ct. 258; Lynch v. Tilden Produce Co. (1924) 265 U. S. 315, 68 L. Ed. 1034, 44 S. Ct. 488.

²⁸ Universal Battery Co. v. United States (1930) 281 U. S. 580, 74 L. Ed. 1051, 50 S. Ct. 422; United States v. Missouri Pac. R. Co. (1929) 278 U. S. 269, 73 L. Ed. 322, 49 S. Ct. 133. See United States v. Erie R. Co. (1915) 236 U. S. 259, 59 L. Ed. 567, 35 S. Ct. 396.

²⁹ Louisville & N. R. Co. v. United States (1931) 282 U. S. 740, 75 L. Ed. 672, 51 S. Ct. 297; United States v. Missouri Pac. R. Co. (1929) 278 U. S. 269, 73 L. Ed. 322, 49 S. Ct. 133. See L. Hand, J., dissenting in Bliss v. Commissioner of Internal Revenue (C. C. A. 2d, 1934) 68 F. (2d) 890, 893.

30 Administrator of Veterans' Affairs.

United States v. Madigan (1937) 300 U. S. 500, 81 L. Ed. 767, 57 S. Ct. 566; *Dismuke v. United States (1936) 297 U. S. 167, 80 L. Ed. 561, 56 S. Ct. 400, rehearing denied in 297 U. S. 728, 80 L. Ed. 1011, 56 S. Ct. 594; Boyett v. United States (C. C. A. 5th, 1936) 86 F. (2d) 66.

binding upon the courts, being at most of persuasive force only.⁸¹

Analogy from this rule may be had to the weight given to legislative construction of the Constitution. A uniform, long continued and un-

Board of Tax Appeals.

United States v. Pleasants (1939) 305 U. S. 357, 83 L. Ed. 217, 59 S. Ct. 281; Spring City Foundry Co. v. Commissioner of Internal Revenue (1934) 292 U. S. 182, 78 L. Ed. 1200, 54 S. Ct. 644.

Commissioner of Internal Revenue.

* Helvering v. Wilshire Oil Co. (1939) 308 U. S. 90, 84 L. Ed. 101, 60 S. Ct. 18, rehearing denied in 308 U. S. 638, 84 L. Ed. 530, 60 S. Ct. 292; * Estate of Sanford v. Commissioner of Internal Revenue (1939) 308 U. S. 39, 84 L. Ed. 20, 60 S. Ct. 51, rehearing denied 308 U. S. 637, 84 L. Ed. 529, 60 S. Ct. 258; Koshland v. Helvering (1936) 298 U. S. 441, 80 L. Ed. 1268, 56 S. Ct. 767, 105 A. L. R. 756; Helvering v. Bliss (1934) 293 U. S. 144, 79 L. Ed. 246, 55 S. Ct. 1724, 95 A. L. R. 207; Burnet v. S. & L. Building Corp. (1933) 288 U. S. 406, 77 L. Ed. 861, 53 S. Ct. 428; Burnet v. Brooks (1933) 288 U. S. 378, 77 L. Ed. 844, 53 S. Ct. 457, 86 A. L. R. 747; McCaughn v. Hershey Chocolate Co. (1931) 283 U. S. 488, 75 L. Ed. 1183, 51 S. Ct. 510; Fawcett Machine Co. v. United States (1931) 282 U. S. 375, 75 L. Ed. 397, 51 S. Ct. 144; Poe v. Seaborn (1930) 282 U. S. 101, 75 L. Ed. 239, 51 S. Ct. 58; Universal Battery Co. v. United States (1930) 281 U. S. 580, 74 L. Ed. 1051, 50 S. Ct. 422; Iselin v. United States (1926) 270 U. S. 245, 70 L. Ed. 566, 46 S. Ct. 248; * Walker v. United States (C. C. A. 8th, 1936) 83 F. (2d) 103. See Vanderbilt v. Eidman (1905) 196 U. S. 480, 49 L. Ed. 563, 25 S. Ct. 331.

Comptroller-General.

Alaska S. S. Co. v. United States (1933) 290 U. S. 256, 78 L. Ed. 302, 54 S. Ct. 159.

Interstate Commerce Commission.

Union Stock Yard & Transit Co. v. United States (1939) 308 U. S. 213, 84 L. Ed. 198, 60 S. Ct. 193; United States v. Chicago, N. S. & M. R. Co. (1933) 288 U. S. 1, 77 L. Ed. 583, 53 S. Ct. 245; Interstate Commerce Commission v. New York, N. H. & H. R. Co. (1932) 287 U. S. 178, 77 L. Ed. 248, 53 S. Ct. 106; Louisville & N. R. Co. v. United States (1931) 282 U. S. 740, 75 L. Ed. 672, 51 S. Ct. 297; Luckenbach S. S. Co. v. United States (1930) 280 U. S. 173, 74 L. Ed. 356, 50 S. Ct. 148. See New York Central Securities Corp. v. United States (1932) 287 U. S. 12, 77 L. Ed. 138, 53 S. Ct. 45.

Patent Office.

Armstrong Paint & Varnish Works v. Nu-Enamel Corp. (1938) 305 U. S. 315, 83 L. Ed. 195, 59 S. Ct. 191, rehearing denied 305 U. S. 675, 83 L. Ed. 437, 59 S. Ct. 356.

Postmaster-General.

Luckenbach S. S. Co. v. United States (1930) 280 U. S. 173, 74 L. Ed. 356, 50 S. Ct. 148; * United States v. Alabama G. S. R. Co. (1892) 142 U. S. 615, 35 L. Ed. 1134, 12 S. Ct. 306. See Grand Trunk Western Ry. Co. v. United States (1920) 252 U. S. 112, 64 L. Ed. 484, 40 S. Ct. 309.

Secretary of Agriculture.

Mintz v. Baldwin (1933) 289 U. S. 346, 77 L. Ed. 1245, 53 S. Ct. 611; United States v. Shreveport Grain & Elevator Co. (1932) 287 U. S. 77, 77 L. Ed. 175, 53 S. Ct. 42; Green Valley Creamery Inc. v. United States (C. C. A. 1st, 1939) 108 F. (2d) 342.

Secretary of the Interior.

Swendig v. Washington Water Power Co. (1924) 265 U. S. 322, 68 L. Ed. 1036, 44 S. Ct. 496; * Logan v. Davis (1914) 233 U. S. 613, 58 L. Ed.

disputed legislative practice resting upon an admissible view of the Constitution is disturbed only for cogent reasons.³²

§ 480. — Additional Weight Where Affirmative Indications of Legislative Approval.

The weight of an administrative construction in judicial interpretation of an ambiguous statute is of additional force where there are affirmative indications, short of statutory reenactment, of legislative approval.³³ Legislative approval is indicated by appropriation of money to pay claims arising under the administrative construction,³⁴

1121, 34 S. Ct. 685; *Hewitt v. Schultz* (1901) 180 U. S. 139, 45 L. Ed. 463, 21 S. Ct. 309; *Heath v. Wallace* (1891) 138 U. S. 573, 34 L. Ed. 1063, 11 S. Ct. 380. See *Hawley v. Diller* (1900) 178 U. S. 476, 44 L. Ed. 1157, 20 S. Ct. 986.

Secretary of Labor.

Costanzo v. Tillinghast (1932) 287 U. S. 341, 77 L. Ed. 350, 53 S. Ct. 152.

Secretary of the Treasury.

Cook v. United States (1933) 288 U. S. 102, 77 L. Ed. 641, 53 S. Ct. 305; *National Lead Co. v. United States* (1920) 252 U. S. 140, 64 L. Ed. 496, 40 S. Ct. 237.

State Agencies.

Standard Oil Co. v. Fitzgerald (C. C. A. 6th, 1936) 86 F. (2d) 799, cert. den. 300 U. S. 683, 81 L. Ed. 886, 57 S. Ct. 753.

Quotations.

"It is a settled doctrine of this court that, in case of ambiguity, the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and, if such construction be acted upon for a number of years, will look with disfavor upon any sudden change, whereby parties who have contracted with the government upon the faith of such construction may be prejudiced. It is especially objectionable that a construction of a statute favorable to the

individual citizen should be changed in such manner as to become retroactive, and to acquire from him the repayment of moneys to which he had supposed himself entitled, and upon the expectation of which he had made his contracts with the government." (Mr. Justice Brown in *United States v. Alabama G. S. R. Co.* (1892) 142 U. S. 615, 621, 35 L. Ed. 1134, 12 S. Ct. 306.)

³¹ *Estate of Sanford v. Commissioner of Internal Revenue* (1939) 308 U. S. 39, 84 L. Ed. 20, 60 S. Ct. 51, rehearing denied 308 U. S. 637, 84 L. Ed. 529, 60 S. Ct. 258; *United States v. Missouri Pac. R. Co.* (1929) 278 U. S. 269, 73 L. Ed. 322, 49 S. Ct. 133. See *United States v. Smith* (1932) 286 U. S. 6, 76 L. Ed. 954, 52 S. Ct. 475.

³² *United States v. Curtiss-Wright Export Corp.* (1936) 299 U. S. 304, 81 L. Ed. 255, 57 S. Ct. 216.

³³ *Alaska S. S. Co. v. United States* (1933) 290 U. S. 256, 78 L. Ed. 302, 54 S. Ct. 159; *McCaughn v. Hershey Chocolate Co.* (1931) 283 U. S. 488, 75 L. Ed. 1183, 51 S. Ct. 510; *United States ex rel. United States Borax Co. v. Ickes* (1938) 68 App. D. C. 399, 98 F. (2d) 271, cert. den. 305 U. S. 619, 83 L. Ed. 395, 59 S. Ct. 80.

³⁴ *Alaska S. S. Co. v. United States* (1933) 290 U. S. 256, 78 L. Ed. 302, 54 S. Ct. 159.

where it is obvious that the declared will of the legislature could not be carried out except through the administrative construction,³⁵ or where there has been failure to amend despite obvious opportunity to do so.³⁶

§ 481. — Administrative Construction Must Be Settled and Receive Acquiescence.

The second rule does not apply where the administrative construction is not consistent, uniform, and settled,³⁷ or has not been generally acquiesced in by the parties affected where there has been opportunity to ascertain whether all parties affected have acquiesced in the construction.³⁸ Construction cannot be uniform and settled when it is made at a time when there is no settled public policy manifested in the statutes with regard to the question in issue.³⁹ In that event an administrative construction may be taken into account only to the extent that it is supported by valid reasons.⁴⁰ Whether such a long settled and uniform administrative construction of a statute exists as to be persuasive or entitled to great weight is a judicial question.⁴¹

An ambiguous construction has no persuasive force.^{41a}

³⁵ *Alaska S. S. Co. v. United States* (1933) 290 U. S. 256, 78 L. Ed. 302, 54 S. Ct. 159.

³⁶ *McCaughn v. Hershey Chocolate Co.* (1931) 283 U. S. 488, 75 L. Ed. 1183, 51 S. Ct. 510; *United States ex rel. United States Borax Co. v. Ickes* (1938) 68 App. D. C. 399, 98 F. (2d) 271, cert. den. 305 U. S. 619, 83 L. Ed. 395, 59 S. Ct. 80.

37 Alien Cases.

Kessler v. Strecker (1939) 307 U. S. 22, 83 L. Ed. 1082, 59 S. Ct. 694.
Board of Tax Appeals.

United States v. Pleasants (1939) 305 U. S. 357, 83 L. Ed. 217, 59 S. Ct. 281.

Commissioner of Internal Revenue.

Burnet v. Chicago Portrait Co. (1932) 285 U. S. 1, 76 L. Ed. 587, 52 S. Ct. 275.

Interstate Commerce Commission.

United States v. Missouri Pac. R. Co. (1929) 278 U. S. 269, 73 L. Ed. 322, 49 S. Ct. 133.

Secretary of the Interior.

Work v. Louisiana (1925) 269 U. S. 250, 70 L. Ed. 259, 46 S. Ct. 92.

See also § 477.

³⁸ *W. P. Brown & Sons Lumber Co. v. Louisville & N. R. Co.* (1937) 299 U. S. 393, 81 L. Ed. 301, 57 S. Ct. 265; *United States v. Erie R. Co.* (1915) 236 U. S. 259, 59 L. Ed. 567, 35 S. Ct. 396.

³⁹ *Work v. Louisiana* (1925) 269 U. S. 250, 70 L. Ed. 259, 46 S. Ct. 92.

⁴⁰ *Burnet v. Chicago Portrait Co.* (1932) 285 U. S. 1, 76 L. Ed. 587, 52 S. Ct. 275; *United States v. Missouri Pac. R. Co.* (1929) 278 U. S. 269, 73 L. Ed. 322, 49 S. Ct. 133.

⁴¹ *Work v. Louisiana* (1925) 269 U. S. 250, 70 L. Ed. 259, 46 S. Ct. 92.

^{41a} *Estate of Sanford v. Commissioner of Internal Revenue* (1939) 308 U. S. 39, 84 L. Ed. 20, 60 S. Ct. 51, rehearing denied 308 U. S. 637, 84 L. Ed. 529, 60 S. Ct. 258.

§ 482. — Reasons for Rule.

Three reasons for according weight to a settled administrative construction have been given, (1) that the construction must be deemed acceptable to the legislature which enacted the statute; (2) that it has been made by those expert in the field and specially informed as to administrative needs and convenience; and (3) the practical significance of the fact that it has received the acquiescence and reliance of interested persons. The weight of an administrative construction is determined by application of these criteria to the circumstances.

An administrative construction is considered acceptable to the legislature where it has been settled over a period so substantial as to demonstrate that it was known to the legislature and acceptable to it because it failed to repudiate the administrative construction by amending the statute.⁴²

Weight may be given an administrative construction on the theory that the agency is specially versed in a field requiring practical and expert knowledge and experience, and is thus specially qualified to interpret a statute pertaining to the field.⁴³ This reason is not applicable where the construction is uncertain, ambiguous, or has not been consistent,⁴⁴ or in any case where it appears that the construction does not embody the results of specialized knowledge or experience.⁴⁵

Weight may be given an administrative construction where it has been generally acquiesced in by interested parties, thereby indicating a construction just to all parties, however affected.⁴⁶ This reason is

⁴² *Alaska S. S. Co. v. United States* (1933) 290 U. S. 256, 78 L. Ed. 302, 54 S. Ct. 159; *Norwegian Nitrogen Products Co. v. United States* (1933) 288 U. S. 294, 77 L. Ed. 796, 53 S. Ct. 350.

⁴³ *Commissioner of Internal Revenue.*

Haggar Co. v. Helvering (1940) 308 U. S. 389, 84 L. Ed. 340, 60 S. Ct. 337; **Estate of Sanford v. Commissioner of Internal Revenue* (1939) 308 U. S. 39, 84 L. Ed. 20, 60 S. Ct. 51, rehearing denied 305 U. S. 637, 84 L. Ed. 529, 60 S. Ct. 258; *Burnet v. S. & L. Building Corp.* (1933) 288 U. S. 406, 77 L. Ed. 861, 53 S. Ct. 428.

Secretary of Agriculture.

See *United States v. Shreveport*

Grain & Elevator Co. (1932) 287 U. S. 77, 77 L. Ed. 175, 53 S. Ct. 42.

Secretary of the Interior.

Heath v. Wallace (1891) 138 U. S. 573, 34 L. Ed. 1063, 11 S. Ct. 380.

⁴⁴ *Estate of Sanford v. Commissioner of Internal Revenue* (1939) 308 U. S. 39, 84 L. Ed. 20, 60 S. Ct. 51, rehearing denied 308 U. S. 637, 84 L. Ed. 529, 60 S. Ct. 258. See also § 477.

⁴⁵ See *Haggar Co. v. Helvering* (1940) 308 U. S. 389, 84 L. Ed. 340, 60 S. Ct. 337.

⁴⁶ *Commissioner of Internal Revenue.*

Estate of Sanford v. Commissioner of Internal Revenue (1939) 308 U. S. 39, 84 L. Ed. 20, 60 S. Ct. 51, rehear-

logically only applicable to instances where the administrative construction has immediate, general application, since genuine acquiescence may then be ascertained. Isolated instances of specific application of an administrative construction do not indicate general acquiescence. Acquiescence or reliance by interested parties cannot be assumed where, if the construction is disclosed in a practice, the practice is not consistent,⁴⁷ or unless it is capable of clear definition as an administrative construction and has been so defined.⁴⁸ Where administrative rulings which disclose a construction have not been enforced, and are contrary to the practices of interested parties, the ruling will not be followed.⁴⁹ No acquiescence by interested parties in an administrative construction may be presumed unless the construction, whether regulation, ruling or practice, is made public.⁵⁰

§ 483. Third Rule: Settled Construction of Ambiguous Statute Reenacted Without Material Change Presumed to Be Ratified by Congress.

Where a regulation interprets a statute which is thereafter reenacted under similar conditions without material change, Congress must be taken to have been familiar with the regulation as an existing administrative interpretation and by reenactment of the statute to have impliedly approved and ratified it.⁵¹ A construction so ratified

ing denied 308 U. S. 637, 84 L. Ed. 529, 60 S. Ct. 258.

Interstate Commerce Commission.

United States v. Chicago, N. S. & M. R. Co. (1933) 288 U. S. 1, 77 L. Ed. 583, 53 S. Ct. 245.

Postmaster-General.

United States v. Alabama G. S. R. Co. (1892) 142 U. S. 615, 35 L. Ed. 1134, 12 S. Ct. 306.

Secretary of the Interior.

Logan v. Davis (1914) 233 U. S. 613, 58 L. Ed. 1121, 34 S. Ct. 685; Hewitt v. Schultz (1901) 180 U. S. 139, 45 L. Ed. 463, 21 S. Ct. 309.

⁴⁷ Estate of Sanford v. Commissioner of Internal Revenue (1939) 308 U. S. 39, 84 L. Ed. 20, 60 S. Ct. 51, rehearing denied 308 U. S. 637, 84 L. Ed. 529, 60 S. Ct. 258; Hagggar Co. v. Helvering (1940) 308 U. S. 389, 84 L. Ed. 340, 60 S. Ct. 337.

⁴⁸ Estate of Sanford v. Commis-

sioner of Internal Revenue (1939) 308 U. S. 39, 84 L. Ed. 20, 60 S. Ct. 51, rehearing denied 308 U. S. 637, 84 L. Ed. 529, 60 S. Ct. 258.

⁴⁹ United States v. Erie R. Co. (1915) 236 U. S. 259, 59 L. Ed. 567, 35 S. Ct. 396.

⁵⁰ See § 477.

⁵¹ **Attorney-General.**

Provost v. United States (1926) 269 U. S. 443, 70 L. Ed. 352, 46 S. Ct. 152.

Commissioner of Internal Revenue.

Morgan v. Commissioner of Internal Revenue (1940) 309 U. S. 78, 84 L. Ed. 585, 60 S. Ct. 424, rehearing denied 309 U. S. 626, 84 L. Ed. 1035, 60 S. Ct. 424; Hagggar Co. v. Helvering (1940) 308 U. S. 389, 84 L. Ed. 340, 60 S. Ct. 337; *Hilvering v. Wilshire Oil Co. (1939) 308 U. S. 90, 84 L. Ed. 101, 60 S. Ct. 18, rehearing denied in 308 U. S. 638, 84

will not be judicially disturbed except for reasons of weight,⁵² and is said to have the force of law.⁵³ Such ratification is especially effective where the regulations have been long continued without substantial change,⁵⁴ where the statute has been repeatedly reenacted,⁵⁵ where

L. Ed. 530, 60 S. Ct. 292; *White v. United States* (1938) 305 U. S. 281, 83 L. Ed. 172, 59 S. Ct. 179; *Helvering v. Winnmill* (1938) 305 U. S. 79, 83 L. Ed. 52, 59 S. Ct. 45; *Koshland v. Helvering* (1936) 298 U. S. 441, 80 L. Ed. 1268, 56 S. Ct. 767, 105 A. L. R. 756; **United States v. Safety Car Heating & Lighting Co.* (1936) 297 U. S. 88, 80 L. Ed. 500, 56 S. Ct. 353, rehearing denied in 297 U. S. 727, 80 L. Ed. 1010, 56 S. Ct. 495; *Hartley v. Commissioner of Internal Revenue* (1935) 295 U. S. 216, 79 L. Ed. 1399, 55 S. Ct. 756; *Herring v. Commissioner of Internal Revenue* (1934) 293 U. S. 322, 79 L. Ed. 389, 55 S. Ct. 179; *Helvering v. Bliss* (1934) 293 U. S. 144, 79 L. Ed. 246, 55 S. Ct. 1724, 95 A. L. R. 207; *United States v. Dakota-Montana Oil Co.* (1933) 288 U. S. 459, 77 L. Ed. 893, 53 S. Ct. 435; **Murphy Oil Co. v. Burnet* (1932) 287 U. S. 299, 77 L. Ed. 318, 53 S. Ct. 161; *Old Colony R. Co. v. Commissioner of Internal Revenue* (1932) 284 U. S. 552, 76 L. Ed. 484, 52 S. Ct. 211; *McCaughn v. Hershey Chocolate Co.* (1931) 283 U. S. 488, 75 L. Ed. 1183, 51 S. Ct. 510; *Poe v. Seaborn* (1930) 282 U. S. 101, 75 L. Ed. 239, 51 S. Ct. 58; *Vanderbilt v. Eidman* (1905) 196 U. S. 480, 49 L. Ed. 563, 25 S. Ct. 331; **Walker v. United States* (C. C. A. 8th, 1936) 83 F. (2d) 103; *Sterling Oil & Gas Co. v. Lucas* (D. C. W. D. Ky., 1931) 51 F. (2d) 413; *Commonwealth Commercial State Bank v. Lucas* (1930) 59 App. D. C. 317, 41 F. (2d) 111; *S. Slater & Sons, Inc. v. White* (D. C. D. Mass., 1940) 33 F. Supp. 329.

Secretary of Labor.

Costanzo v. Tillinghast (1932) 287

U. S. 341, 77 L. Ed. 350, 53 S. Ct. 152.

Secretary of the Treasury.

**National Lead Co. v. United States* (1920) 252 U. S. 140, 64 L. Ed. 496, 40 S. Ct. 237.

General References.

The reenactment rule logically applies only to interpretative, not to legislative, regulations. See the next chapter dealing with regulations, especially § 489.

See also Randolph E. Paul's article, "Use and Abuse of Tax Regulations in Statutory Construction" (1940) 49 *Yale L. Jour.* 660, reprinted with some changes in his "Studies in Taxation," Third Series (1940) p. 420.

⁵² *McCaughn v. Hershey Chocolate Co.* (1931) 283 U. S. 488, 75 L. Ed. 1183, 51 S. Ct. 510.

⁵³ Commissioner of Internal Revenue

Helvering v. Winnmill (1938) 305 U. S. 79, 83 L. Ed. 52, 59 S. Ct. 45; *Hartley v. Commissioner of Internal Revenue* (1935) 295 U. S. 216, 79 L. Ed. 1399, 55 S. Ct. 756; *Old Mission Portland Cement Co. v. Helvering* (1934) 293 U. S. 289, 79 L. Ed. 367, 55 S. Ct. 158; *Tyson v. Commissioner of Internal Revenue* (C. C. A. 7th, 1933) 68 F. (2d) 584, cert. den. 292 U. S. 657, 78 L. Ed. 1505, 54 S. Ct. 865.

⁵⁴ *Helvering v. Winnmill* (1938) 305 U. S. 79, 83 L. Ed. 52, 59 S. Ct. 45. E. g., for 18 years, *M. E. Blatt Co. v. United States* (Ct. Cl., 1938) 23 F. Supp. 461.

⁵⁵ *White v. United States* (1938) 305 U. S. 281, 83 L. Ed. 172, 59 S. Ct. 179. E. g., seven times, *M. E. Blatt Co. v. United States* (Ct. Cl., 1938) 23 F. Supp. 461.

the construction was made by the Attorney-General, adopted by the Treasury, and called to the attention of Congress which rejected a recommended change,⁵⁶ whenever it appears that the legislature has rejected a proposed change in the wording construed,⁵⁷ or when it appears that reenactment has been occasioned by an attempted change of administrative construction.⁵⁸ Where Congress later adopts the very suggestion of change made and rejected before, it then intends to change the law recognized as previously existing under an administrative construction.⁵⁹ This rule has been applied almost exclusively to regulations under revenue acts, due to the great number of tax regulations and frequent enactment of revenue acts.⁶⁰

Administrative construction receiving legislative approval by reenactment of a statutory provision, without material change, has especial weight where the administrative construction standing by itself may be dubious.⁶¹

§ 484. — What Constitutes "Material Change."

A statute providing for valuation of various items comprising a depletion allowance for tax purposes is not materially changed upon reenactment by a provision allocating a certain percentage for the allowance, so as to preclude congressional approval of a regulation defining items which were to be included in a depletion allowance.⁶²

§ 485. — Conditions Must Be Similar Upon Reenactment.

The rule applies only to cases presenting the precise conditions existing prior to reenactment.⁶³

§ 486. — Administrative Construction Must Be Settled Prior to Reenactment.

The rule presuming ratification of an administrative construction of a statute thereafter reenacted has no application where the admin-

⁵⁶ *Provost v. United States* (1926) 269 U. S. 443, 70 L. Ed. 352, 46 S. Ct. 152.

⁵⁷ *Poe v. Seaborn* (1930) 282 U. S. 101, 75 L. Ed. 239, 51 S. Ct. 58.

⁵⁸ *Luckenbach S. S. Co. v. United States* (1930) 280 U. S. 173, 74 L. Ed. 356, 50 S. Ct. 148.

⁵⁹ *Provost v. United States* (1926) 269 U. S. 443, 70 L. Ed. 352, 46 S. Ct. 152.

⁶⁰ See § 489 et seq.

⁶¹ *Helvering v. Wilshire Oil Co.* (1939) 309 U. S. 90, 84 L. Ed. 101, 60 S. Ct. 18, rehearing denied 308 U. S. 638, 84 L. Ed. 530, 60 S. Ct. 292.

⁶² *United States v. Dakota-Montana Oil Co.* (1933) 288 U. S. 459, 77 L. Ed. 893, 53 S. Ct. 435.

⁶³ *United States v. Missouri Pac. R. Co.* (1929) 278 U. S. 269, 73 L. Ed. 322, 49 S. Ct. 133.

istrative construction is not settled.⁶⁴ Thus where an administrative construction has been changed prior to reenactment of the ambiguous statute, the reasonable inference is that the original ambiguity is restored to the statutory provision so that the administrative construction cannot have received legislative approval.⁶⁵

§ 487. Statutory Incorporation of Construction.

Where regulations construing a statute are incorporated into a reenactment of that statute, they are intended to clarify, not to change the law, even though the later statute is not retroactive.⁶⁶

§ 488. Change in Administrative Construction.

Where an administrative ruling has been consistent and not ambiguous for a substantial period, during which the statute has been reenacted, subsequent change of the ruling does not preclude the usual inference of congressional approval of the administrative construction at the time of reenactment.⁶⁷

The second and third rules set forth above cannot be taken to limit the continuing rule-making power of an agency to change an administrative construction for prospective application.⁶⁸

The rule presuming congressional ratification of an administrative construction by reenactment⁶⁹ does not mean that by amendment of the statute, precluding such a construction in the future, Congress declares that the administrative construction was the construction intended by the earlier Congress which enacted the statute.⁷⁰

⁶⁴ *Helvering v. Wilshire Oil Co.* (1939) 308 U. S. 90, 84 L. Ed. 101, 60 S. Ct. 18, rehearing denied 308 U. S. 638, 84 L. Ed. 530, 60 S. Ct. 292; *Iselin v. United States* (1926) 270 U. S. 245, 70 L. Ed. 566, 46 S. Ct. 248. See also § 476.

⁶⁵ *Helvering v. Wilshire Oil Co.* (1939) 308 U. S. 90, 84 L. Ed. 101, 60 S. Ct. 18, rehearing denied in 308 U. S. 638, 84 L. Ed. 530, 60 S. Ct. 292.

⁶⁶ *Hartley v. Commissioner of Internal Revenue* (1935) 295 U. S. 216, 79 L. Ed. 1399, 55 S. Ct. 756.

⁶⁷ *Bliss v. Commissioner of Internal*

Revenue (C. C. A. 2d, 1934) 68 F. (2d) 890, aff'd 293 U. S. 144, 79 L. Ed. 246, 55 S. Ct. 17, 95 A. L. R. 207. See *Commonwealth Commercial State Bank v. Lucas* (1930) 59 App. D. C. 317, 41 F. (2d) 111.

⁶⁸ *Helvering v. Wilshire Oil Co.* (1939) 308 U. S. 90, 84 L. Ed. 101, 60 S. Ct. 18, rehearing denied in 308 U. S. 638, 84 L. Ed. 530, 60 S. Ct. 292. See also § 493.

⁶⁹ See § 483.

⁷⁰ *Haggard Co. v. Helvering* (1940) 308 U. S. 389, 84 L. Ed. 340, 60 S. Ct. 337.

SUBDIVISION V

EXTENT AND SCOPE OF JUDICIAL REVIEW OF ADMINISTRATIVE RULES AND REGULATIONS

CHAPTER 29

IN GENERAL

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§ 489. Introduction.

This part treats only judicial review of administrative rules and regulations, their nature and scope, types of administrative regulations, questions as to their validity, and the extent of statutory duty imposed

where administrative regulations are promulgated. Questions of delegation of legislative power to make rules and regulations are treated in the chapter on delegation. The present chapter should also be read in connection with the preceding chapter on the weight of an administrative construction in the decision of a judicial question.¹

Regulations are either "legislative" or "interpretative" in nature.^a Legislative regulations are those promulgated pursuant to a specific delegatory provision and limited by a legislative standard affirmatively set forth in that provision. Interpretative regulations, on the other hand, are issued pursuant to a statutory provision of an entirely general nature which does not purport to confine the regulations promulgated thereunder to the implementation of a specific standard. Interpretative regulations may literally roam at will through the general or ambiguous terms of an entire statute.^b

Hence, from the standpoint of the separation of powers, a legislative regulation is valid ^c if Congress has exercised its essential legislative function by setting up an appropriate standard ^d therefor, and if the regulation fits the standard, that is, if it bears a reasonable relation to and is consistent with it. Further considerations are not necessary in order to ascertain the validity of a legislative regulation so far as the separation of powers is concerned.^e The only remaining question is one of due process or reasonableness.^f If these tests are met, without more, legislative regulations have the force of law.

Interpretative regulations, however, rest on an entirely different constitutional basis. They cannot acquire the force of law simply because they seem "consistent" with the statute—a meaningless term in this regard—because, due to the absence of a controlling standard, Congress has not exercised its essential legislative function with respect to the subject matter. A general or ambiguous legal term appropriate for an interpretative regulation is entirely different from a

¹ See § 475 et seq.

^a See Ellsworth C. Alvord in "Treasury Regulations of the Wilshire Oil Case" (1940) 40 Col. L. Rev. 252; Erwin N. Griswold in "A Summary of the Regulations Problem" (1941) 54 Harv. L. Rev. 398, 1323; A. H. Feller in "Addendum to the Regulations Problem" (1941) 54 Harv. L. Rev. 1311; Stanley S. Surrey "The Scope and Effect of Treasury Regulations under the Income, Es-

tate and Gift Taxes" (1940) 88 U. of Pa. L. Rev. 556.

^b See *Helvering v. R. J. Reynolds Tobacco Co.* (1939) 306 U. S. 110, 83 L. Ed. 536, 59 S. Ct. 423.

^c See § 492.

^d See § 22 et seq.

^e See Ellsworth C. Alvord in "Treasury Regulations of the Wilshire Oil Case" (1940) 40 Col. L. Rev. 252.

^f See § 500.

standard describing a factual condition. Congress cannot delegate the power to make laws;^g and an interpretative regulation, therefore, constitutes nothing more substantial than an administrative construction or interpretation of a general term in a statute—that is an administrative guess at a judicial question. But as in similar instances of this practical function of the administrative process,^h a mere administrative venture at a decision of a judicial question is not binding. It cannot have the force of law.ⁱ Something more is necessary; and certain rules for ascertaining the weight or validity of interpretative regulations are set forth in the chapter on “Administrative Construction.”^j

However, the cases have not as yet affirmatively labeled these two types of regulations as “legislative” or “interpretative”^k and this distinction although cogently pointed out in current legal writings,^l has not yet been crystallized in the opinions. Nevertheless, the decisions have been perhaps remarkably consistent in their separate treatment of the two categories, especially when the haphazard nature of the development of administrative law is considered.

Because of a natural division in the cases, this chapter is devoted principally to legislative regulations, while interpretative regulations are discussed in the chapter on “Administrative Construction.”^m

“Procedural”ⁿ regulations ordinarily do not become the subject of judicial review because, relating to the mechanics of administration, they seldom affect private rights. They are a type of legislative regulation. They are perhaps most analogous to administrative rules.^o

I. NATURE AND SCOPE OF ADMINISTRATIVE REGULATIONS

§ 490. In General.

Congress may delegate power to an administrative agency to make regulations to implement in greater detail the purposes and standards of the statute under which the agency acts. It may express a general rule and invest an administrative agency with authority to promulgate regulations appropriate to its enforcement.² Regulations may make

^g See § 11 et seq.

^h See § 73 et seq.

ⁱ See § 425.

^j See Chapter 28, § 475 et seq.

^k But see *Helvering v. R. J. Reynolds Tobacco Co.* (1939) 306 U. S. 110, 83 L. Ed. 536, 59 S. Ct. 423.

^l See note a, *supra* (1940).

^m See Chapter 28, § 475 et seq.

ⁿ See Ellsworth C. Alvord in “Treasury Regulations of the Wilshire Oil Case” (1940) 40 Col. L. Rev. 252.

^o See § 495.

² *Koshland v. Helvering* (1936) 298 U. S. 441, 80 L. Ed. 1268, 56 S. Ct. 767, 105 A. L. R. 756.

explicit what is general, and clear up doubts arising from the uncertainty of a statute,³ and definition of statutory terms may be made by administrative regulation.⁴ However, the power of an administrative agency to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law, for no such power can be delegated by Congress, but the power to adopt regulations to carry into effect the will of Congress as expressed by statute,⁵ or the will of a state legislature similarly expressed.⁶ Departmental regulations may not invade the field of legislation, but must be confined within the limits of congressional enactment.⁷ Within that field, in practical effect, regulations are "little laws."⁸ The making of legislative regulations is definitely within the administrative province, once the constitutional requirements for delegation of legislative power have been met, and is thus directly analogous to the determination of an administrative question.⁹

³ *United States v. Dakota-Montana Oil Co.* (1933) 288 U. S. 459, 77 L. Ed. 893, 53 S. Ct. 435; *Ramsey v. Commissioner of Internal Revenue* (C. C. A. 10th, 1933) 66 F. (2d) 316, cert. den. 290 U. S. 673, 78 L. Ed. 581, 54 S. Ct. 91.

⁴ *Morrissey v. Commissioner of Internal Revenue* (1935) 296 U. S. 344, 80 L. Ed. 263, 56 S. Ct. 289; *United States v. Donahue Bros., Inc.* (C. C. A. 8th, 1932) 59 F. (2d) 1019.

⁵ Commissioner of Internal Revenue.

Manhattan General Equipment Co. v. Commissioner of Internal Revenue (1936) 297 U. S. 129, 80 L. Ed. 528, 56 S. Ct. 397.

Interstate Commerce Commission.

See *Chicago, I. & L. Ry. Co. v. International Milling Co.* (C. C. A. 8th, 1930) 43 F. (2d) 93.

Secretary of Agriculture.

United States v. Grimaud (1911) 220 U. S. 506, 55 L. Ed. 563, 31 S. Ct. 480.

Tariff Commission.

J. W. Hampton Jr. & Co. v. United States (1928) 276 U. S. 394, 72 L. Ed. 624, 48 S. Ct. 348.

Quotations.

"The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law—for no such power can be delegated by Congress—but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity." (Mr. Justice Sutherland in *Manhattan General Equipment Co. v. Commissioner of Internal Revenue* (1936) 297 U. S. 129, 134, 80 L. Ed. 528, 56 S. Ct. 392.)

⁶ *P. F. Petersen Baking Co. v. Bryan* (1934) 290 U. S. 570, 78 L. Ed. 505, 54 S. Ct. 277, 90 A. L. R. 1285.

⁷ *Commissioner of Internal Revenue v. Van Vorst* (C. C. A. 9th, 1932) 59 F. (2d) 677.

⁸ See *Chicago, I. & L. Ry. Co. v. International Milling Co.* (C. C. A. 8th, 1930) 43 F. (2d) 93, cert. den. 282 U. S. 885, 75 L. Ed. 781, 51 S. Ct. 89.

⁹ See § 505 et seq.

§ 491. Standards of Statute Implicit in Regulation.

The standards of the statute setting up an administrative scheme are implicit in any regulations issued thereunder.¹⁰ Thus where the standards for action by an agency are due regard for the public interest and the protection of investors, within the meaning of the act, these standards are implicit in a regulation providing that a registration statement may not be withdrawn without the consent of the agency. The regulation must be construed to authorize denial of withdrawal of the statement only where due regard to the public interest and the protection of investors requires that the withdrawal be denied.¹¹ Whether the regulation is valid must finally be determined by the provisions of the statute interpreted in the light of the Constitution.¹²

§ 492. Valid Regulations Have Force of Statute.

A valid legislative regulation, that is, one made pursuant to constitutional and statutory authority, has the same force as though prescribed in terms by statute.¹³

The effect of violation of an administrative regulation may not, however, have the same effect as violation of the statute itself.¹⁵

§ 493. Regulations Generally Prospective in Operation.

Regulations under a statute are usually promulgated for prospective effect.¹⁶ Regulations once issued may later be clarified or enlarged so

¹⁰ *Jones v. Securities & Exchange Commission* (1936) 298 U. S. 1, 80 L. Ed. 1015, 56 S. Ct. 654. See also § 568.

¹¹ *Jones v. Securities & Exchange Commission* (1936) 298 U. S. 1, 80 L. Ed. 1015, 56 S. Ct. 654.

¹² *Commissioner of Internal Revenue v. Van Vorst* (C. C. A. 9th, 1932) 59 F. (2d) 677.

¹³ *Commissioner of Internal Revenue.*

Tyson v. Commissioner of Internal Revenue (C. C. A. 7th, 1933) 68 F. (2d) 584, cert. den. 292 U. S. 657, 78 L. Ed. 1505, 54 S. Ct. 865; *F. T. Dooley Lumber Co. v. United States* (C. C. A. 8th, 1933) 63 F. (2d) 384, cert. den. 290 U. S. 640, 78 L. Ed. 556, 54 S. Ct. 58.

Federal Trade Commission.

E. Griffiths Hughes, Inc. v. Federal Trade Commission (1933) 61 App. D.

C. 386, 63 F. (2d) 362.

Interstate Commerce Commission.

Atchison, T. & S. F. Ry. Co. v. Scarlett (1937) 300 U. S. 471, 81 L. Ed. 748, 57 S. Ct. 541, rehearing denied 301 U. S. 712, 81 L. Ed. 1365, 57 S. Ct. 787; *Chicago, I. & L. Ry. Co. v. International Milling Co.* (C. C. A. 8th, 1930) 43 F. (2d) 93, cert. den. 282 U. S. 885, 75 L. Ed. 781, 51 S. Ct. 89.

National Bituminous Coal Commission.

Mallory Coal Co. v. National Bituminous Coal Commission (1938) 69 App. D. C. 166, 99 F. (2d) 399.

¹⁵ See § 502 et seq.

¹⁶ *Helvering v. Wilshire Oil Co.* (1939) 308 U. S. 90, 84 L. Ed. 101, 60 S. Ct. 18, rehearing denied 308 U. S. 638, 84 L. Ed. 530, 60 S. Ct. 292.

as to meet administrative exigencies or conform to judicial decision.¹⁷

In general an administrative regulation may not be applied retroactively.¹⁸ However, where an original regulation is invalid because not consistent with the statute or unreasonable, a valid amended regulation becomes the primary and controlling rule in respect of the situation presented, even as to past transactions. In such a case the amended regulation points the way for the first time for correctly applying the antecedent statute to the particular situation. It is said to be no more retroactive in its operation than is a judicial determination construing and applying a statute to a case in hand.¹⁹

II. TYPES OF ADMINISTRATIVE REGULATIONS AND RULES

§ 494. Types of Administrative Regulations.

Legislative regulations fall into two groups, (1) general regulations which determine factual questions in the abstract for general application within the scope of the agency's authority, and (2) local regulations, which while of general application to all parties affected, are directed only to particular factual situations and are ordinarily made specifically applicable by order to particular parties.

The usual administrative regulation is of the first type. Regulations of general application are abstract in character, and are seldom specifically enforced by order because their application is as broad as that of the source statute itself. Their practical effect is that of an abstract determination of an administrative question applicable to the entire public rather than to specific parties only. Because of their general application they need not be based on findings.²⁰ Such regulations have the effect of giving general notice as to the agency's interpretation of a statute.²¹

Local regulations, on the other hand, are usually specifically made effective by order.²² Proration of the total allowable production of oil

¹⁷ *Morrissey v. Commissioner of Internal Revenue* (1935) 296 U. S. 344, 80 L. Ed. 263, 56 S. Ct. 289.

¹⁸ *Helvering v. Wilshire Oil Co.* (1939) 308 U. S. 90, 84 L. Ed. 101, 60 S. Ct. 18, rehearing denied 308 U. S. 638, 84 L. Ed. 530, 60 S. Ct. 292. See *Helvering v. R. J. Reynolds Tobacco Co.* (1939) 306 U. S. 110, 83 L. Ed. 536, 59 S. Ct. 423.

¹⁹ *Manhattan General Equipment Co. v. Commissioner of Internal Revenue* (1936) 297 U. S. 129, 80 L. Ed. 528, 56 S. Ct. 397.

²⁰ See § 554.

²¹ *United States v. Donahue Bros., Inc.* (C. C. A. 8th, 1932) 59 F. (2d) 1019.

²² *Thompson v. Consolidated Gas Utilities Corp.* (1937) 300 U. S. 55, 81 L. Ed. 510, 57 S. Ct. 364. See *Panama Refining Co. v. Ryan* (1935) 293 U. S. 388, 79 L. Ed. 446, 55 S. Ct. 241.

from a common reservoir has been made by administrative regulation enforced by order.²³

§ 494A. Administrative Rulings.

Administrative rulings are ordinarily issued upon the basis of a specific set of facts hypothetically or otherwise stated for the purpose of obtaining the ruling. They are not necessarily issued by the same official who has the statutory power or duty of promulgating regulations on the same subject matter. Indeed they may be issued by various officials within a single department. For instance, rulings of the Treasury Department may be issued by the Chief Counsel for the Bureau of Internal Revenue, by the Commissioner of Internal Revenue, or by certain other officials of the Department. In addition an administrative ruling is not binding upon the party seeking the ruling. If a ruling is contested it is ordinarily superseded by a definitive form of administrative action which is judicially reviewable.

§ 495. Administrative Rules.

Administrative rules, such as rules of practice, usually relate to matters of administrative procedure. Ordinarily agencies have statutory power, express or implied, to make reasonable rules for the conduct of their administrative proceedings,²⁴ including power to limit and select the persons who may practice before the agency,²⁵ and the taking of evidence.²⁶ Such procedural rules may not in any circumstances limit or control the statutory jurisdiction conferred upon the agency,²⁷ or deprive a party of his right to be heard before the

²³ *Thompson v. Consolidated Gas Utilities Corp.* (1937) 300 U. S. 55, 81 L. Ed. 510, 57 S. Ct. 364.

²⁴ Board of Tax Appeals.

Goldsmith v. Board of Tax Appeals (1926) 270 U. S. 117, 70 L. Ed. 494, 46 S. Ct. 215; *Board of Tax Appeals v. United States ex rel. Shults Bread Co.* (1929) 59 App. D. C. 161, 37 F. (2d) 442, cert. den. (1930) 281 U. S. 731, 74 L. Ed. 1147, 50 S. Ct. 246; *Lewis-Hall Iron Works v. Blair* (1928) 57 App. D. C. 364, 23 F. (2d) 972, cert. den. 277 U. S. 592, 72 L. Ed. 1004, 48 S. Ct. 529.

Federal Trade Commission.

See *E. Griffiths Hughes, Inc. v. Federal Trade Commission* (1933) 61 App. D. C. 386, 63 F. (2d) 362.

National Bituminous Coal Commission.

See *Mallory Coal Co. v. National Bituminous Coal Commission* (1938) 69 App. D. C. 166, 99 F. (2d) 399.

²⁵ *Goldsmith v. Board of Tax Appeals* (1926) 270 U. S. 117, 70 L. Ed. 494, 46 S. Ct. 215.

²⁶ *Goldsmith v. Board of Tax Appeals* (1926) 270 U. S. 117, 70 L. Ed. 494, 46 S. Ct. 215; *Securities & Exchange Commission v. Torr* (D. C. S. D. N. Y., 1936) 15 F. Supp. 144.

²⁷ *Board of Tax Appeals v. United States ex rel. Shults Bread Co.* (1929) 59 App. D. C. 161, 37 F. (2d) 442, cert. den. (1930) 281 U. S. 731, 74 L. Ed. 1147, 50 S. Ct. 246.

agency.²⁸ The power to make procedural rules ordinarily includes discretionary power to make reasonable modifications in a given case.²⁹ An example of such a modification is extension of time for pleading, which is discretionary, and in the absence of gross abuse, may not be judicially reviewed.³⁰

Long continued and consistent practice may have the effect of a rule of practice.³¹

Rules adopted by an agency as to admission, suspension or disbarment of any practitioner must be construed where possible to mean exercise of discretion after fair investigation, with such a notice, hearing and opportunity to answer as would constitute due process.³²

Ordinarily an administrative agency also has discretion to make reasonable rules as to whether hearings shall be public or private.³³

Where the consideration to be given to a rule of the Senate affects persons other than members of the Senate, the question presented is of necessity a judicial one.³⁴

III. VALIDITY OF ADMINISTRATIVE REGULATIONS

§ 496. Judicial Review of Administrative Regulations.

The validity of an administrative regulation will be judicially determined in any proper case in which an administrative sanction or order, finding, ruling, or any other form of administrative action assailed depends upon the validity of the regulation.³⁵

²⁸ Board of Tax Appeals v. United States ex rel. Shults Bread Co. (1929) 59 App. D. C. 161, 37 F. (2d) 442, cert. den. (1930) 281 U. S. 731, 74 L. Ed. 1147, 50 S. Ct. 246.

²⁹ Board of Tax Appeals v. United States ex rel. Shults Bread Co. (1929) 59 App. D. C. 161, 37 F. (2d) 442, cert. den. (1930) 281 U. S. 731, 74 L. Ed. 1147, 50 S. Ct. 246.

³⁰ Board of Tax Appeals v. United States ex rel. Shults Bread Co. (1929) 59 App. D. C. 161, 37 F. (2d) 442, cert. den. (1930) 281 U. S. 731, 74 L. Ed. 1147, 50 S. Ct. 246.

³¹ See *Helvering v. Continental Oil Co.* (1933) 63 App. D. C. 5, 68 F. (2d) 750, cert. den. (1934) 292 U. S. 627, 78 L. Ed. 1481, 54 S. Ct. 629.

³² *Goldsmith v. Board of Tax Ap-*

peals (1926) 270 U. S. 117, 70 L. Ed. 494, 46 S. Ct. 215. See also § 274 et seq.

³³ *E. Griffiths Hughes, Inc. v. Federal Trade Commission* (1933) 61 App. D. C. 386, 63 F. (2d) 362.

³⁴ *United States v. Smith* (1932) 286 U. S. 6, 76 L. Ed. 954, 52 S. Ct. 475.

³⁵ *Commissioner of Internal Revenue. Hagggar Co. v. Helvering* (1940) 308 U. S. 389, 84 L. Ed. 340, 60 S. Ct. 337; *Helvering v. Wilshire Oil Co.* (1939) 308 U. S. 90, 84 L. Ed. 101, 60 S. Ct. 18, rehearing denied 308 U. S. 638, 84 L. Ed. 530, 60 S. Ct. 292; *United States v. Dakota-Montana Oil Co.* (1933) 288 U. S. 459, 77 L. Ed. 893, 53 S. Ct. 435; *Burnet v. S. & L. Building Corp.* (1933) 288 U. S. 406,

§ 497. No Substitution for Agency's Judgment.

Since the power to make legislative regulations within proper limits may be delegated by the legislature, questions of judgment involved in promulgation of regulations fall within the administrative province just as with respect to administrative questions properly delegated for administrative determination.³⁶ Thus the judgment of a court or jury cannot be substituted for that of an agency set forth in a regulation.³⁷ And where administrative regulations prescribing standards for safe appliances under the Federal Safety Appliance Act³⁸ have been met as to a particular appliance, that particular appliance must be held to be safe within the meaning of the statute, and no court or jury can substitute its judgment for that of the agency as to the safety of the particular appliance within the meaning of the act.³⁹

§ 498. Presumption of Validity.

To all legislative regulations purporting to be made under authority legally delegated, there attaches a presumption of the existence of facts justifying the specific exercise of power to make the

77 L. Ed. 861, 53 S. Ct. 428; *Burnet v. Brooks* (1933) 288 U. S. 378, 77 L. Ed. 844, 53 S. Ct. 457, 86 A. L. R. 747; *Murphy Oil Co. v. Burnet* (1932) 287 U. S. 299, 77 L. Ed. 318, 53 S. Ct. 161; *Old Colony R. Co. v. Commissioner of Internal Revenue* (1932) 284 U. S. 552, 76 L. Ed. 484, 52 S. Ct. 211; *Fawcett Machine Co. v. United States* (1931) 282 U. S. 375, 75 L. Ed. 397, 51 S. Ct. 144.

The President.

Panama Refining Co. v. Ryan (1935) 293 U. S. 388, 79 L. Ed. 446, 55 S. Ct. 241.

Secretary of Commerce.

Swetland v. Curtiss Airports Corp. (D. C. N. D. Ohio, E. Div., 1930) 41 F. (2d) 929, modified (C. C. A. 6th, 1932) 55 F. (2d) 201, 83 A. L. R. 319; *Johnson v. Rylander* (D. C. N. D. Cal., S. Div., 1937) 18 F. Supp. 689.

Secretary of the Treasury.

Waite v. Macy (1918) 246 U. S. 606, 62 L. Ed. 892, 38 S. Ct. 395.

State Agencies.

Thompson v. Consolidated Gas Utilities Corp. (1937) 300 U. S. 55, 81 L. Ed. 510, 57 S. Ct. 364; *P. F. Petersen Baking Co. v. Bryan* (1934) 290 U. S. 570, 78 L. Ed. 505, 54 S. Ct. 277, 90 A. L. R. 1285; *Snively Groves, Inc. v. Florida Citrus Commission* (D. C. N. D. Fla., Gainesville Div., 1938) 23 F. Supp. 601.

³⁶ See § 8 et seq.

³⁷ *Atchison, T. & S. F. Ry. Co. v. Scarlett* (1937) 300 U. S. 471, 81 L. Ed. 748, 57 S. Ct. 541, rehearing denied 301 U. S. 712, 81 L. Ed. 748, 57 S. Ct. 541; *Securities & Exchange Commission v. Torr* (D. C. S. D. N. Y., 1936) 15 F. Supp. 144. See also § 517.

³⁸ 45 USCA 4.

³⁹ *Atchison, T. & S. F. Ry. Co. v. Scarlett* (1937) 300 U. S. 471, 81 L. Ed. 748, 57 S. Ct. 541, rehearing denied 301 U. S. 712, 81 L. Ed. 1365, 57 S. Ct. 787.

regulation.⁴⁰ Regulations are always entitled to respectful consideration because they constitute contemporaneous construction of a statute by those charged with its administration.⁴¹

§ 499. First Rule of Validity: Regulation Must Be Consistent and in Harmony with Statute.

An administrative regulation is invalid where unauthorized, that is, where it bears no reasonable relation to, or is inconsistent or out of harmony with, the statute itself.⁴² Regulations which would extend, alter, abridge, enlarge or modify the controlling statute are beyond

⁴⁰ *Thompson v. Consolidated Gas Utilities Corp.* (1937) 300 U. S. 55, 81 L. Ed. 510, 57 S. Ct. 364; *Pacific States Box & Basket Co. v. White* (1935) 296 U. S. 176, 80 L. Ed. 138, 56 S. Ct. 159, 101 A. L. R. 853.

"Sixth. It is urged that this rebuttable presumption of the existence of a state of facts sufficient to justify the exertion of the police power attaches only to acts of legislature; and that where the regulation is the act of an administrative body, no such presumption exists, so that the burden of proving the justifying facts is upon him who seeks to sustain the validity of the regulation. The contention is without support in authority or reason, and rests upon misconception. Every exertion of the police power, either by the legislature or by an administrative body, is an exercise of delegated power. Where it is by a statute, the legislature has acted under power delegated to it through the Constitution. Where the regulation is by an order of an administrative body, that body acts under a delegation from the legislature. The question of law may, of course, always be raised whether the legislature had power to delegate the authority exercised. Compare *Panama Refining Co. v. Ryan*, 293 U. S. 388 and *A. L. A. Schechter Poultry Corp. v. United States*, 295 U. S. 495. But

where the regulation is within the scope of authority legally delegated, the presumption of the existence of facts justifying its specific exercise attaches alike to statutes, to municipal ordinances, and to orders of administrative bodies. Compare *Aetna Insurance Co. v. Hyde*, 275 U. S. 440, 447. Here there is added reason for applying the presumption of validity; for the regulation now challenged was adopted after notice and public hearing as the statute required." (Mr. Justice Brandeis in *Pacific States Box & Basket Co. v. White* (1935) 296 U. S. 176, 185, 186, 80 L. Ed. 138, 56 S. Ct. 159, 101 A. L. R. 853.)

⁴¹ *Fawcett Machine Co. v. United States* (1931) 282 U. S. 375, 75 L. Ed. 397, 51 S. Ct. 144.

⁴² This is the substantial equivalent of the first rule regarding the weight of administrative decision of judicial questions. See § 478.

Commissioner of Internal Revenue.

Manhattan General Equipment Co. v. Commissioner of Internal Revenue (1936) 297 U. S. 129, 80 L. Ed. 528, 56 S. Ct. 397, rehearing denied in 297 U. S. 728, 80 L. Ed. 1010, 56 S. Ct. 587; *Fawcett Machine Co. v. United States* (1931) 282 U. S. 375, 75 L. Ed. 397, 51 S. Ct. 144; *Helvering v. Safe Deposit & Trust Co. of Baltimore* (C. C. A. 4th, 1938) 95 F. (2d)

the agency's power⁴³ and a rule restricting the agency's power more narrowly than the statute does not limit its jurisdiction and may be disregarded by the agency.⁴⁴ Whether a regulation is valid must finally be determined by the provisions of the statute interpreted in the light of the Constitution.⁴⁵

806; *Union Bed & Spring Co. v. Commissioner of Internal Revenue* (C. C. A. 7th, 1930) 39 F. (2d) 383.

Librarian of Congress.

Bong v. Alfred S. Campbell Art Co. (1909) 214 U. S. 236, 53 L. Ed. 979, 29 S. Ct. 628.

Secretary of the Interior.

United States v. George (1913) 228 U. S. 14, 57 L. Ed. 712, 33 S. Ct. 412.

Secretaries of War and of Commerce.

The Flying By (D. C. D. N. J., 1933) 4 F. Supp. 884, aff'd (C. C. A. 3d, 1934) 71 F. (2d) 968.

State Agencies.

Thompson v. Consolidated Gas Utilities Corp. (1937) 300 U. S. 55, 81 L. Ed. 510, 57 S. Ct. 364; *Zukaitis v. Fitzgerald* (D. C. W. D. Mich., S. Div., 1936) 18 F. Supp. 1000.

⁴³ See § 478.

Commissioner of Internal Revenue.

Ramsey v. Commissioner of Internal Revenue (C. C. A. 10th, 1933) 66 F. (2d) 316, cert. den. 290 U. S. 673, 78 L. Ed. 581, 54 S. Ct. 91; *Burnet v. Marston* (1932) 61 App. D. C. 91, 57 F. (2d) 611; *Sterling Oil & Gas Co. v. Lucas* (D. C. W. D. Ky., 1931) 51 F. (2d) 413.

Commissioner of Prohibition.

Campbell v. Galeno Chemical Co. (1930) 281 U. S. 599, 74 L. Ed. 1063, 50 S. Ct. 412.

Director of the Veterans' Bureau.

Nordberg v. United States (D. C. Mont., 1931) 51 F. (2d) 271.

Public Utilities Commission (District of Columbia).

Patrick v. Smith (1930) 60 App. D. C. 6, 45 F. (2d) 924.

Secretary of Agriculture.

United States v. Antikamnia Chemical Co. (1914) 231 U. S. 654, 58 L. Ed. 419, 34 S. Ct. 222.

Secretary of the Interior.

United States v. George (1913) 228 U. S. 14, 57 L. Ed. 712, 33 S. Ct. 412; **United States v. United Verde Copper Co.* (1905) 196 U. S. 207, 49 L. Ed. 449, 25 S. Ct. 222.

Secretary of the Treasury.

United States v. Eaton (1892) 144 U. S. 677, 36 L. Ed. 591, 12 S. Ct. 764; *United States v. Powell* (C. C. A. 4th, 1938) 95 F. (2d) 752, cert. den. 305 U. S. 619, 83 L. Ed. 395, 59 S. Ct. 79.

Superintendent of Licenses (District of Columbia).

Coombe v. United States ex rel. Selis (1925) 55 App. D. C. 190, 3 F. (2d) 714.

Quotations.

"No doubt it is true that this Court cannot displace the judgment of the board in any matter within its jurisdiction, but it is equally true that the board cannot enlarge the powers given to it by statute and cover a usurpation by calling it [by regulation] a decision on purity, quality or fitness for consumption." (Mr. Justice Holmes in *Waite v. Macy* (1918) 246 U. S. 606, 608, 62 L. Ed. 892, 38 S. Ct. 395.)

⁴⁴ *Spiller v. Atchison, T. & S. F. R. Co.* (1920) 253 U. S. 117, 64 L. Ed. 810, 40 S. Ct. 466.

⁴⁵ *Commissioner of Internal Revenue v. Van Vorst* (C. C. A. 9th, 1932) 59 F. (2d) 677.

It is a judicial question as to whether an administrative regulation is within the statutory authority of an agency,⁴⁶ or to use the alternative phrase, whether it bears any reasonable relation to the avowed purposes of the statute,⁴⁷ including (1) whether the regulation is adequate for its purpose as laid down by the statute,⁴⁸ and (2) whether it is unjust in its application.⁴⁹ The statute and the regulation must be construed together, and if there is a conflict, the regulation must give way.⁵⁰

An administrative agency may not prescribe any regulations for a judicial hearing; as, for example, a regulation shifting the burden of proof in the judicial hearing.⁵¹

§ 500. Second Rule of Validity: Regulation Must Not Be Arbitrary or Unreasonable.

In addition to the requirements of the first rule, to be valid an administrative regulation must not be arbitrary or unreasonable so as to violate the due process clause.⁵²

46 Commissioner of Internal Revenue.

Murphy Oil Co. v. Burnet (1932) 287 U. S. 299, 77 L. Ed. 318, 53 S. Ct. 161; Ramsey v. Commissioner of Internal Revenue (C. C. A. 10th, 1933) 66 F. (2d) 316, cert. den. 290 U. S. 673, 78 L. Ed. 581, 54 S. Ct. 91.

Interstate Commerce Commission.

* Chicago, I. & L. Ry. Co. v. International Milling Co. (C. C. A. 8th, 1930) 43 F. (2d) 93, cert. den. 282 U. S. 885, 75 L. Ed. 781, 51 S. Ct. 89.

Prohibition Administrator.

Campbell v. Galeno Chemical Co. (1930) 281 U. S. 599, 74 L. Ed. 1063, 50 S. Ct. 412; Selkow v. Campbell (C. C. A. 2d, 1930) 45 F. (2d) 971, cert. den. 283 U. S. 844, 75 L. Ed. 1454, 51 S. Ct. 492.

Secretary of War.

United States v. Gilbert (D. C. M. D., Pa., 1932) 58 F. (2d) 1031.

47 United States v. Grimaud (1911) 220 U. S. 506, 55 L. Ed. 563, 31 S. Ct. 480; Johnson v. Rylander (D. C. N. D. Cal., S. Div., 1937) 18 F. Supp. 689 (Secy. of Commerce); Service Mut. Liability Ins. Co. v. United States

(D. C. D. Mass., 1937) 18 F. Supp. 613 (ICC).

48 Murphy Oil Co. v. Burnet (1932) 287 U. S. 299, 77 L. Ed. 318, 53 S. Ct. 161.

49 Murphy Oil Co. v. Burnet (1932) 287 U. S. 299, 77 L. Ed. 318, 53 S. Ct. 161.

50 Union Bed & Spring Co. v. Commissioner of Internal Revenue (C. C. A. 7th, 1930) 39 F. (2d) 383.

51 Petition of Warszawski (D. C. E. D. Mich., S. Div., 1936) 16 F. Supp. 43.

52 Commissioner of Internal Revenue.

Manhattan General Equipment Co. v. Commissioner of Internal Revenue (1936) 297 U. S. 129, 80 L. Ed. 528, 56 S. Ct. 397, rehearing denied 297 U. S. 728, 80 L. Ed. 1010, 56 S. Ct. 587; Fawcus Machine Co. v. United States (1931) 282 U. S. 375, 75 L. Ed. 397, 51 S. Ct. 144; Sterling Oil & Gas Co. v. Lucas (D. C. W. D. Ky., 1931) 51 F. (2d) 413.

Secretary of Agriculture.

Nolan v. Morgan (C. C. A. 7th, 1934) 69 F. (2d) 471.

§ 501. Full Hearing and Findings Not Necessary.

There is no constitutional necessity for a hearing as a prerequisite to promulgation of a general regulation.⁵³ Where all members of a class affected by an administrative order promulgating a regulation stand alike, all individuals do not have a constitutional right to be heard before a matter can be decided in which all are equally concerned.⁵⁴ It is hard to believe that the proposition can be seriously made that there is a constitutional right to any further notice than such as is had by reason of the fact that the time of the agency's meeting is fixed by law. Where a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. There must be a limit to individual argument in such matters if government is to go on.⁵⁵

A local regulation which determines a controversy between specific parties, is however in the nature of an administrative order, and a full hearing must be accorded.⁵⁶

Findings are not necessary to the promulgation of regulations of general application.⁵⁷

IV. EXTENT OF DUTY IMPOSED BY ADMINISTRATIVE REGULATION**§ 502. Scope of Statutory Duty Imposed Prior to Promulgation of Regulations.**

Where a statute imposes a duty, leaving the detailed standards for discharging that duty to be set forth in administrative regulations, the duty imposed by the statute is absolute and imperative prior to the promulgation of detailed standards by regulation.⁵⁸ Thus pending adoption by the Interstate Commerce Commission of regulations setting standards for making ladders on railroad cars "secure" as required by the Federal Safety Appliance Act,⁵⁹ the statute has the effect

State Agencies.

Thompson v. Consolidated Gas Utilities Corp. (1937) 300 U. S. 55, 81 L. Ed. 510, 57 S. Ct. 364.

⁵³ Bi-Metallic Investment Co. v. State Board of Equalization (1915) 239 U. S. 441, 60 L. Ed. 372, 36 S. Ct. 141. Compare § 274 et seq.

⁵⁴ Bi-Metallic Investment Co. v. State Board of Equalization (1915) 239 U. S. 441, 60 L. Ed. 372, 36 S. Ct. 141.

⁵⁵ Bi-Metallic Investment Co. v. State Board of Equalization (1915) 239 U. S. 441, 60 L. Ed. 372, 36 S. Ct. 141.

⁵⁶ See §§ 64 and 65.

⁵⁷ See § 554.

⁵⁸ Atchison, T. & S. F. Ry. Co. v. Scarlett (1937) 300 U. S. 471, 81 L. Ed. 748, 57 S. Ct. 571.

⁵⁹ 45 USCA 4.

of prescribing an absolute and imperative duty, interpretable judicially, of making the ladders and other appliances "secure." This duty is not limited until by regulations the Commission sets detailed standards for "secure" appliances, in which event the duty of the railroad under the statute is limited by the requirements of the regulations.⁶⁰

§ 503. Effect of Compliance with Regulation.

Where an administrative regulation is complied with, the standard or purpose sought to be accomplished by the statute implemented by the regulations is discharged in full.⁶¹ Thus where standards of safe railroad appliances are left by statute to be determined by regulations of the Interstate Commerce Commission, compliance with that agency's regulations fulfills all safety provisions of the statute, and precludes liability under the statute for maintaining an unsafe appliance.⁶² No liability under the statute may be predicated upon a factual condition not outlawed by the regulations.⁶³

§ 504. Effect of Violation of Regulation or Rule.

Violation of an administrative regulation does not have the consequences of violation of a statute, since a legislative regulation may be invalid while the statute under which the agency acts is valid. But where a statute creates a duty, to be measured and defined by regulations promulgated by an administrative agency, violation of such regulations, lawfully made, is a violation of the statute.⁶⁴

While the validity of a rule depends upon its being in harmony with the statute, and reasonable in itself, the force to be accorded to the rule, and consequently the effect of its violation, depend on whether the rule is procedural, relating merely to matters of

⁶⁰ Atchison, T. & S. F. Ry. Co. v. Scarlett (1937) 300 U. S. 471, 81 L. Ed. 748, 57 S. Ct. 541, rehearing denied 301 U. S. 712, 81 L. Ed. 1365, 57 S. Ct. 787.

⁶¹ Atchison, T. & S. F. Ry. Co. v. Scarlett (1937) 300 U. S. 471, 81 L. Ed. 748, 57 S. Ct. 541, rehearing denied 301 U. S. 712, 81 L. Ed. 1365, 57 S. Ct. 787; Southern Ry. Co. v. Lunsford (1936) 297 U. S. 398, 80 L. Ed. 740, 56 S. Ct. 504, rehearing denied 297 U. S. 729, 80 L. Ed. 1011, 56 S. Ct. 667.

⁶² Atchison, T. & S. F. Ry. Co. v.

Scarlett (1937) 300 U. S. 471, 81 L. Ed. 748, 57 S. Ct. 541, rehearing denied 301 U. S. 712, 81 L. Ed. 1365, 57 S. Ct. 787.

⁶³ Atchison, T. & S. F. Ry. Co. v. Scarlett (1937) 300 U. S. 471, 81 L. Ed. 748, 57 S. Ct. 541, rehearing denied 301 U. S. 712, 81 L. Ed. 1365, 57 S. Ct. 787.

⁶⁴ United States v. Griffin (D. C. S. D. Ga., Savannah Div., 1935) 12 F. Supp. 135. This rule obviously cannot apply to interpretative regulations. See also § 489.

form, or is substantive in its nature. The purpose and intent of the rule will control whether its violation has an effect as serious as that produced by the violation of a statute.⁶⁵ Thus, although the Interstate Commerce Commission's rules as to the form for railroad tariffs replacing others established and in effect, were valid, they related to procedural matters only, and failure to conform to them was held not to have invalidated the new tariffs or to have prolonged the existence of the old ones.⁶⁶

⁶⁵ Chicago, I. & L. Ry. Co. v. International Milling Co. (C. C. A. 8th, 1930) 43 F. (2d) 93, cert. den. 282 U. S. 885, 75 L. Ed. 781, 51 S. Ct. 89.

⁶⁶ Chicago, I. & L. Ry. Co. v. International Milling Co. (C. C. A. 8th, 1930) 43 F. (2d) 93, cert. den. 282 U. S. 885, 75 L. Ed. 781, 51 S. Ct. 89.



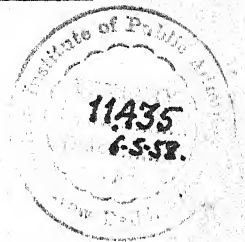
Federal Administrative Law

1947 Cumulative Supplement

BY

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WITH AN INTRODUCTION BY ROSCOE POUND, FORMERLY
DEAN OF THE HARVARD LAW SCHOOL



COVERING MATERIAL THROUGH VOLUMES:

66 Sup. Ct. 1383
154 F. (2d) 1023
65 F. Supp. 800

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1947

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INTRODUCTION

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With the rise and growth of the idea of the "service-state," the state which does or seeks to do more than maintain the general security by adjustment of relations and ordering of behavior so as to eliminate or reduce to a minimum friction and waste in the endeavor of individuals to satisfy their individual wants and claims, which seeks actively to promote the general welfare by doing things for men through a regimented cooperation instead of leaving them to do things for themselves by individual initiative and free self-assertion, administration has come to play a leading role in the English-speaking world, as it had always done in that part of the world whose institutional and legal ideas are derived from Rome. But in our Anglo-American legal-constitutional polity what is done by the state, i.e. what is done by those who exercise the powers and apply the force of politically organized society, is expected to be done according to law. Hence as a matter of course from the time when the phenomena of the service state began to be noticed, we have spoken of administrative law. What, then, is administrative law? Is it simply the ordinary law of the land as applied to administrative agencies and officials or is it a separate and distinct system which, as Continental European and some recent English writers tell us, is swallowing up or replacing the law under which we had been living and setting up a regime in which those agencies and officials are upon a plane of their own free from the checks and limitations which had grown up in our legal polity and given us our legal constitutional ideals?

Blackstone put the matter as it had grown out of the contests of courts and crown in medieval and seventeenth-century England and the controversies of colonists and the Privy Council and Parliament in seventeenth and eighteenth-century America. He treated of public law under the private law of persons. Certainly in our inherited system there was no administrative law differentiating the administrative agency or official from persons generally.

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At bottom, when we speak of administrative law all depends on what we mean by "law." Some of those who have been loudest in support of unchecked power of administrative agencies to do what they like in any way that they like hold that "law" means simply whatever is done officially. Hence what such agencies do is law because they do it. The more radical of these thinkers go further and deny that there is in reality any necessary authoritative system or method in what is done by the agencies of politically organized society in determining controversies or adjusting relations and assert that law is no more than a series of independent and more or less unconnected determinations and orders.

There are others, whose views are imported from Continental Europe, who hold that legislatures and the administrative hierarchy are each final judges of their own powers and that administrative agencies and officials are final interpreters of the laws they are set up to administer. To them, all scrutiny of administrative rule-making or administrative adjudication is merely impertinent. Such is not the polity which was set up in America by the state constitutions adopted on the morrow of the Declaration of Independence and taken as a model for our constitutions ever since. Such are not the ideas in which American lawyers have been brought up. I need not argue that the administrative agency in our polity stands on no higher plane than the ordinary citizen with respect to obligation to adhere to the law of the land as interpreted and declared by the courts in the course of orderly litigation in which all action prejudicial to the rights of any one may be scrutinized as to its conformity or want of conformity with the requirements of the law. With us, administrative law cannot mean a regime of administrative superiority to the constitution or to the legislation which has set up administrative agencies nor to the common law which is part of the law of the land so far as constitutions or statutes have not abrogated it.

Again, administrative law might mean the settled principles of procedure of administrative agencies in the exercise of their powers of investigation, guidance, and adjudication. But this is something which as yet has hardly developed as a system. Indeed, it is something to which many who are concerned with the administrative process object as foreign to their conception of administration in the service-state. It is, however, something on which lawyers in a polity of government according to law must insist. It is something which must be developed if our legal constitutional polity is to endure.

Finally, administrative law might mean the body of legal precepts and technique of developing and applying them applicable in judicial

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scrutiny or judicial review of administrative determinations. Here, at any rate, we can find something with the characteristics which Anglo-American lawyers attribute to law.

What we have chiefly to consider, whatever name we give to it, is the relation of the courts to the exercise of what are called quasi-judicial functions by administrative agencies and what is needed in the way of legislation and judicial decision to make the courts effective in securing to individuals the rights guaranteed by our constitutions and the fundamentals of full and fair hearing by an impartial tribunal acting in accordance with standing laws which our bills of rights call for and the Declaration of Rights promulgated by the Continental Congress pronounced the birthright of Americans. The problem is to secure this much without detracting from the efficiency of the administrative agencies in their legitimate operations in their legitimate fields.

Mr. vom Baur, rightly as it seems to me, assumes that "administrative law" means or may be made to mean law in the lawyer's sense. Indeed, a good first step in this direction has been taken already in the Administrative Procedure Act of 1946. If the courts do their duty by this Act it will prove a long step toward maintaining our characteristic constitutional polity. They can make administrative law a true system of law such as Americans have always understood a body of law to be. They can make it a part of the law of the land in a legal constitutional polity.

In his book, to which this is a supplement, the author instead of treating each administrative agency by itself as in no legal relation to others, and the corollary of that proposition treating each operation of each agency as something apart, to be looked at in itself only, has thought of principles of law—authoritative starting points for legal reasoning—applicable to all administrative agencies and to all that each does. Hence he has found general categories with principles applicable to them and has sought common features in the items of exercise of their powers from which principles may be discovered. Moreover, in the true spirit of Anglo-American law these categories have been framed and these items have been classified from scrutiny of the decisions of the courts, finding in the decisions of particular cases, dealing with particular items of exercise of powers for particular agencies, the common features behind them from which principles may be discovered. This is the technique of the common-law lawyer. It is the method of judicial empiricism by which our law has grown as experience developed by reason and reason tested by experience. It finds sources and forms of law in reported judicial experience

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of adjudication leading to a system instead of a formless unorganized body of determinations without significance one for another.

Something has been done toward providing materials for administrative law by administrative agencies which have published reports of their determinations. On this basis, a start becomes possible toward administrative law in the third sense suggested above. But systematizing as to particular agencies, which has gone on at varying rates, and with little working out of a technique leading to predictable results in most cases, is far from enough. A comparative method, leading to discovery of common lines of reasoning running through the work of each agency is called for. The Administrative Procedure Act moves in this direction and Mr. vom Baur's technique bringing to bear decisions of the courts as to particular agencies upon the determinations of others in analogous cases is a great step forward.

I have spoken of the book only from the standpoint of the science of law. But it cannot but be a great help to courts in their work of scrutinizing administrative action, and to practising lawyers in their everyday task of arguing before administrative tribunals and advising clients as to what may be expected to be done by these tribunals, to have the materials of a true administrative law presented in this way.

Federal Administrative Law

Volume 1

1947 Cumulative Supplement

BOOK I

FOUNDATION AND NATURE, DEVELOPMENT AND SCOPE OF ADMINISTRATIVE LAW

CHAPTER 1

THE NATURE OF ADMINISTRATIVE LAW: CONTROLLING CONSTITUTIONAL PRINCIPLES

I. THE NATURE AND SCOPE OF ADMINISTRATIVE LAW

§ 2. Administrative Law Distinguished from Other Branches of Constitutional Law.

p. 5, n. 3. For an example of an attack on an administrative order on the ground that its sanction violated the constitution, without drawing into question the validity of the administrative action culminating in the order, see *North American Co. v. Securities & Exchange Commission* (1946) 327 U. S. 686, 90 L. Ed. 945, 66 S. Ct. 785; *Hotel & Restaurant Employees International Alliance, Local No. 122 v. Wisconsin Employment Relations Board* (1942) 315 U. S. 437, 86 L. Ed. 946, 62 S. Ct. 706.

§ 2A. (New) Growth of Administrative Law.

As is pointed out in the preface, the Supreme Court has, with increasing frequency, in deciding a case involving the validity of action of one administrative agency, relied on decisions involving other agencies. This is because the principles governing the validity of administrative action, except where dependent upon statutory pro-

visions, are constitutional principles of general application. This has resulted in the development of administrative law into a cohesive set of horizontal principles which are generally applicable to administrative agencies. The following general statement of the doctrine of administrative finality is a good example:

"It has now long been settled that findings of the Board, as with those of other administrative agencies, are conclusive upon reviewing courts when supported by evidence, that the weighing of conflicting evidence is for the Board and not for the courts, that the inferences from the evidence are to be drawn by the Board and not by the courts, save only as questions of law are raised and that upon such questions of law, the experienced judgment of the Board is entitled to great weight." (Mr. Chief Justice Stone in *Medo Photo Supply Corp. v. National Labor Relations Board* (1944) 321 U. S. 678, 681, 88 L. Ed. 1007, 64 S. Ct. 830.)

§ 3. The Supremacy of Law and Separation of Powers as the Backbone of Administrative Law.

The supremacy of law is a product of experience. It is in profound contrast to the structure of primitive governments and even to the striking intellectual concepts which developed on the continent of Europe, notably France, in the eighteenth century. Those concepts, and primitive governments, are based on the philosophy that the courts must not interfere at all with the acts of government administrators. As a practical matter, that means that government officials and agencies are the final judges of their own powers, that they control the courts with respect to their acts, and that the limitations written in any paper constitution are mere abstractions to the extent that government administrators disregard them.

Under the supremacy of law embodied in Article III of the Constitution, the ordinary courts are empowered to control government officials and agencies to the extent of holding them to the law. That means that government administrators are not above the law but are subject to it equally with private persons. It also means that no individual may be made to suffer in body or property except for a distinct breach of the law as determined by the ordinary courts. See * *Stark v. Wickard* (1944) 321 U. S. 288, 88 L. Ed. 733, 64 S. Ct. 559, and Dicey's classic work on the supremacy of law in England, which has gone through nine editions, "Introduction to the Study of the Law of the Constitution." The doctrine is discussed as the foundation of our form of government and system of administrative law in Vom Baur, "Methods of Judicial Review of Administrative Determinations," *New York Law Journal* for May 26, 27, 28 and 29, 1947, p. 2072. It is reaffirmed in the Administrative Procedure Act, § 10(b), (c).

To a great extent the subject matter of the doctrine of supremacy of law is the use of words, for the scope of powers and rights depends upon the meaning of particular words in a constitution or law. The supremacy of law places reliance upon the courts as the supreme interpreter of language, and thus secures construction of language by a learned and impartial tribunal. In doing so the doctrine tends to maintain the integrity of the dictionary, the use of words as a uniform

medium of expression and a reliable basis for human relationships, and intellectual honesty in the relations between government and the individual.

p. 5, n. 5. See * Stark v. Wickard, 321 U. S. 238, 88 L. Ed. 733, 64 S. Ct. 559, and United States v. Ashley Bread Co. (D. C. S. D. W. Va., 1944) 59 F. Supp. 671.

§ 4. — Fundamental Criterion of Administrative Law: The Type of Question Involved.

With respect to the difficulties recently said to inhere in the problem of distinguishing between questions of fact and questions of law, see John Kelley Co. v. Commissioner of Internal Revenue (1946) 326 U. S. 521, 90 L. Ed. 278, 66 S. Ct. 299, and Mr. Justice Frankfurter concurring in Bingham v. Commissioner of Internal Revenue (1945) 325 U. S. 365, 89 L. Ed. 1670, 65 S. Ct. 1232.

§ 5. Determination of Facts Not Exclusively Within the Judicial Power: The Due Process Clause.

The doctrine of separation of powers does not deny to Congress power to direct that an administrative agency have ample latitude within which to ascertain the factual conditions which Congress has made prerequisite to the operation of the legislative command. Yakus v. United States (1944) 321 U. S. 414, 88 L. Ed. 834, 64 S. Ct. 660; Bowles v. Willingham (1944) 321 U. S. 503, 88 L. Ed. 892, 64 S. Ct. 641.

§ 6. Practical Basis for Development of Administrative Agencies and Administrative Law.

Congress may not delegate the power to make law, but it may delegate the power to determine facts. Hence Congress may specify the conditions of fact upon whose existence or occurrence, ascertained from relevant data by a designated administrative agency, it directs that its statutory command shall be effective. * Yakus v. United States (1944) 321 U. S. 414, 88 L. Ed. 834, 64 S. Ct. 660; Bowles v. Willingham (1944) 321 U. S. 503, 88 L. Ed. 892, 64 S. Ct. 641.

“The question of how far Congress should go in filling in the details of the standards which its administrative agency is to apply raises large issues of policy. Sunshine Anthracite Coal Co. v. Adkins, 310 U. S. 381, 398. We recently stated in connection with this problem of delegation, ‘The Constitution, viewed as a continuously operative charter of government, is not to be interpreted as demanding the impossible or the impracticable.’ Opp Cotton Mills, Inc. v. Administrator, supra, page 145. In terms of hard-headed practicalities Congress frequently could not perform its functions if it were required to make an appraisal of the myriad of facts applicable to varying situations, area by area throughout the land, and then to determine in each case what should be done. Congress does not abdicate its functions when it describes what job must be done, who must do it, and what is the scope of his authority. In our complex economy that indeed is frequently the only way in which the legislative process can go forward. Whether a particular grant of authority to an officer or agency is wise or unwise, raises questions which are none of our con-

cern. Our inquiry ends with the constitutional issue. Congress here has specified the basic conclusions of fact upon the ascertainment of which by the Administrator its statutory command is to become effective." (Mr. Justice Douglas in *Bowles v. Willingham* (1944) 321 U. S. 503, 515, 88 L. Ed. 892, 64 S. Ct. 641.)

p. 14, n. 36. For instance, the Wagner Act did not undertake the impossible task of specifying in precise and unmistakable language each incident which would constitute an unfair labor practice. On the contrary, that Act left to the Board the work of applying the Act's general prohibitory language in the light of the infinite combinations of events which might be charged as violations of its terms. Thus a "rigid scheme of remedies is avoided and administrative flexibility within appropriate statutory limitations obtained to accomplish the dominant purpose of the legislation." *Republic Aviation Corp. v. National Labor Relations Board* (1945) 324 U. S. 792, 798, 89 L. Ed. 1372, 65 S. Ct. 982.

"Congress could have retained for itself the granting or denial of the use of the air for broadcasting purposes, and it could have granted individual licenses by individual enactments as in the past it gave river and harbor rights to individuals. Instead of making such a crude use of its Constitutional powers, Congress, by the Communications Act of 1934, 48 Stat. 1064, 47 U. S. C. 151, formulated an elaborate licensing scheme and established the Federal Communications Commission as its agency for enforcement." (Mr. Justice Frankfurter, dissenting in *Ashbacker Radio Corp. v. Federal Communications Commission* (1945) 326 U. S. 327, 335, 90 L. Ed. 108, 66 S. Ct. 148.)

For an example of the difficulties into which the courts may be led in attempting to apply broad statutory terminology to individual and specific factual situations in the absence of the benefit of a prior judgment, on vexing and ambiguous facts, by an "expert administrative agency," see *10 East 40th Street Bldg., Inc., v. Callus* (1945) 325 U. S. 578, 89 L. Ed. 1806, 65 S. Ct. 1227.

See *Mahler v. Eby* (1924) 264 U. S. 32, 68 L. Ed. 549, 44 S. Ct. 283.

p. 15, n. 38. See *United States v. Detroit & Cleveland Navigation Co.* (1945) 326 U. S. 236, 90 L. Ed. 38, 66 S. Ct. 75; *Mitchell v. United States* (1941) 313 U. S. 80, 85 L. Ed. 1201, 61 S. Ct. 873.

II. DELEGATION OF LEGISLATIVE POWER

A. *In General*

§ 8. Delegation by Congress.

Statutes delegating powers to public officers must be strictly construed. See § 442A.

§ 10A. (New) Subdelegation.

A power is personal where personal trust or confidence is reposed in the agent or where it involves the exercise of judgment or discretion, and may not be subdelegated unless the statute authorizes subdelegation. *Cudahy Packing Co. of Louisiana v. Holland* (1942) 315 U. S. 357, 788, 86 L. Ed. 895, 62 S. Ct. 651; **Shreveport Engraving Co. v. United States* (C. C. A. 5th, 1944) 143 F. (2d) 222, cert. den. 323 U. S. 749, 89 L. Ed. 600, 65 S. Ct. 82, rehearing den. 323 U. S. 815, 89 L. Ed. 648, 65 S. Ct. 128.

A power which is not personal may be subdelegated in accordance with the principles of the law of agency. **Shreveport Engraving Co. v. United States* (C. C. A. 5th, 1944) 143 F. (2d) 222, cert. den. 323 U. S. 749, 89 L. Ed. 600, 65 S. Ct. 82, rehearing den. 323 U. S. 815, 89 L. Ed. 648, 65 S. Ct. 128. See *United States ex rel. Brandon v. Donner* (C. C. A. 2d, 1944) 139 F. (2d) 761.

Any subdelegation is valid which is authorized by statute.

Commissioner of Internal Revenue. See *Dixon v. United States* (C. C. A. 8th, 1941) 116 F. (2d) 907, cert. den. 312 U. S. 705, 85 L. Ed. 1138, 61 S. Ct. 826.

The President. *Perkins v. Brown* (D. C. S. D. Ga., Savannah Div., 1943) 53 F. Supp. 177; *Henderson v. Bryan* (D. C. Cal., 1942) 46 F. Supp. 682. See *Shotkin v. Nelson* (C. C. A. 10th, 1944) 146 F. (2d) 402.

Price Administrator. *Bowles v. East St. Johns Shingle Co.* (C. C. A. 9th, 1945) 152 F. (2d) 45; * *Bowles v. Wheeler* (C. C. A. 9th, 1945) 152 F. (2d) 34, cert. den. 326 U. S. 775, 90 L. Ed. 468, 66 S. Ct. 265; *Bowles v. Griffin* (C. C. A. 5th, 1945) 151 F. (2d) 458; *O'Neal v. United States* (C. C. A. 6th, 1944) 140 F. (2d) 908, cert. den. 322 U. S. 729, 88 L. Ed. 1565, 64 S. Ct. 945.

Securities and Exchange Commission. *Penfield Co. of California v. Securities & Exchange Commission* (C. C. A. 9th, 1944) 143 F. (2d) 746.

Unlimited authority of an administrative officer to delegate the exercise of a power capable of oppressive use, such as the subpoena power, is not lightly to be inferred. * *Cudahy Packing Co. of Louisiana v. Holland* (1942) 315 U. S. 357, 788, 86 L. Ed. 895, 62 S. Ct. 651; *In re Mohawk Wrecking & Lumber Co.* (D. C. E. D. Mich., 1946) 65 F. Supp. 164.

The same principles which will admit of delegation in any case may suffice to justify a redelegation or subdelegation. *Shreveport Engraving Co. v. United States* (C. C. A. 5th, 1944) 143 F. (2d) 222, cert. den. 323 U. S. 749, 89 L. Ed. 600, 65 S. Ct. 82, rehearing den. 323 U. S. 815, 89 L. Ed. 648, 65 S. Ct. 128.

B. Powers Which May Be Delegated

§ 11. Congress Cannot Delegate Its Essential Legislative Functions.

The essentials of the "legislative function" are the determination of legislative policy and its formulation and promulgation as a defined and binding rule of conduct, and the essentials are preserved when Congress has specified the basic conditions of fact upon whose existence or occurrence, ascertained from relevant data by a designated administrative agency, it directs that its statutory command shall be effective. *Yakus v. United States* (1944) 321 U. S. 414, 88 L. Ed. 834, 64 S. Ct. 660.

The power to fix fair and equitable prices confers no greater reach for administrative determination than the power to fix just and reasonable rates. Both matters are questions of fact. *Yakus v. United States* (1944) 321 U. S. 414, 88 L. Ed. 834, 64 S. Ct. 660.

p. 19, n. 61. *O'Neal v. United States* (C. C. A. 6th, 1944) 140 F. (2d) 908, cert. den. 322 U. S. 729, 88 L. Ed. 1565, 64 S. Ct. 945; *Board of Com'rs of Pawnee County v. United States* (C. C. A. 10th, 1943) 139 F. (2d) 248, cert. den. 321 U. S. 795, 88 L. Ed. 1084, 64 S. Ct. 846.

§ 13. Scope of Legislative Powers Which May Be Delegated, in General.

It is no objection that the determination of facts and the inferences to be drawn from them in the light of the statutory standards and the declaration of policy call for the exercise of judgment and for the formulation of subsidiary administrative policy within the statutory

framework. Nor is it objectionable that the agency designated for that purpose have ample latitude within which he is to ascertain the conditions prerequisite to the operation of the statutory mandate. Congress is not confined to minimal delegation of discretion to administrative agencies in executing its policy, but is free to employ instead the flexibility of less restrictive standards. *Yakus v. United States* (1944) 321 U. S. 414, 88 L. Ed. 834, 64 S. Ct. 660; *Bowles v. Willingham* (1944) 321 U. S. 503, 88 L. Ed. 892, 64 S. Ct. 641.

Congress may also delegate to an agency authority to adopt and apply general or subsidiary policies so long as they are consistent with the standards of the Act. *Yakus v. United States* (1944) 321 U. S. 414, 88 L. Ed. 834, 64 S. Ct. 660; *Eastern Central Motor Carriers Ass'n v. United States* (1944) 321 U. S. 194, 88 L. Ed. 668, 64 S. Ct. 499. Where such subsidiary policy is applied in a particular case, adequate findings must be made. *Eastern Central Motor Carriers Ass'n v. United States* (1944) 321 U. S. 194, 88 L. Ed. 668, 64 S. Ct. 499. See §§ 25, 551.

Whether a particular grant of authority to an administrative agency is wise or unwise raises questions which are outside the scope of judicial review. *Bowles v. Willingham* (1944) 321 U. S. 503, 88 L. Ed. 892, 64 S. Ct. 641.

p. 21, n. 72. **The President.** *O'Neal v. United States* (C. C. A. 6th, 1944) 140 F. (2d) 908, cert. den. 322 U. S. 729, 88 L. Ed. 1565, 64 S. Ct. 945.

Price Administrator. *Yakus v. United States* (1944) 371 U. S. 414, 88 L. Ed. 834, 64 S. Ct. 660; *Taylor v. Brown* (Em. App., 1943) 137 F. (2d) 654, cert. den. 320 U. S. 787, 88 L. Ed. 473, 64 S. Ct. 194.

Secretary of the Interior. *Board of Com'rs of Pawnee County v. United States* (C. C. A. 10th, 1943) 139 F. (2d) 248, cert. den. 321 U. S. 795, 88 L. Ed. 1084, 64 S. Ct. 846.

War Food Administrator. *Varney v. Warehime* (C. C. A. 6th, 1945) 147 F. (2d) 238, cert. den. 325 U. S. 882, 89 L. Ed. 1997, 65 S. Ct. 1575.

Quotations. "The mandate of the Constitution [Art. I, § 1] that all legislative powers granted 'shall be vested' in Congress has never been thought to preclude Congress from resorting to the aid of administrative officers or boards as fact-finding agencies whose findings, made in conformity to previously adopted legislative standards or definitions of Congressional policy, have been made prerequisite to the operation of its statutory command. The adoption of the declared policy by Congress and its definition of the circumstances in which its command is to be effective, constitute the performance, in the constitutional sense, of the legislative function." (Mr. Chief Justice Stone, in *Opp Cotton Mills, Inc. v. Administrator of the Wage & Hour Division* (1941) 312 U. S. 126, 144, 85 L. Ed. 624, 61 S. Ct. 524.)

p. 23, n. 74. *Yakus v. United States* (1944) 321 U. S. 414, 88 L. Ed. 834, 64 S. Ct. 660; *O'Neal v. United States* (C. C. A. 6th, 1944) 140 F. (2d) 908, cert. den. 322 U. S. 729, 88 L. Ed. 1565, 64 S. Ct. 945; *Board of Com'rs of Pawnee County v. United States* (C. C. A. 10th, 1943) 139 F. (2d) 248, cert. den. 321 U. S. 795, 88 L. Ed. 1084, 64 S. Ct. 846.

p. 23, n. 75. *Yakus v. United States* (1944) 321 U. S. 414, 88 L. Ed. 834, 64 S. Ct. 660.

p. 23, n. 76. * *Opp Cotton Mills, Inc. v. Administrator of the Wage & Hour Division* (1941) 312 U. S. 126, 85 L. Ed. 624, 61 S. Ct. 524; *O'Neal v. United States* (C. C. A. 6th, 1944) 140 F. (2d) 908, cert. den. 322 U. S. 729, 88 L. Ed. 1565, 64 S. Ct. 945.

§ 14. — Power to Investigate.

The Federal Trade Commission likewise has authority to investigate alleged violations of the anti-trust laws and to make recommendations to the Attorney General, but no power of its own to restrain

violations, save as they may incidentally be violations of other statutes which the Commission may enforce. *United States Alkali Export Ass'n, Inc. v. United States* (1945) 325 U. S. 196, 89 L. Ed. 1554, 65 S. Ct. 1120.

The provisions of the Securities Act authorizing the Securities and Exchange Commission to require the production of documents relevant to an investigation are not unconstitutional as delegations of judicial power. *Penfield Co. of California v. Securities & Exchange Commission* (C. C. A. 9th, 1944) 143 F. (2d) 746.

The power to investigate may, as in the case of the National Labor Relations Board, extend to issuance of an administrative subpoena when charges have been filed, but before the issuance of a complaint. *National Labor Relations Board v. Barrett Co.* (C. C. A. 7th, 1941) 120 F. (2d) 583.

See § 607 et seq.

§ 15. — Power to Make Regulations.

p. 24, n. 85. *Angelus Milling Co. v. Commissioner of Internal Revenue* (1945) 325 U. S. 293, 89 L. Ed. 1619, 65 S. Ct. 1162.

p. 25, n. 87. *Taylor v. Brown* (Em. App., 1943) 137 F. (2d) 654, cert. den. 320 U. S. 787, 88 L. Ed. 473, 64 S. Ct. 194.

p. 25, n. 90. *Angelus Milling Co. v. Commissioner of Internal Revenue* (1945) 325 U. S. 293, 89 L. Ed. 1619, 65 S. Ct. 1162.

§ 16. — — Prescription of Uniform System of Accounts.

p. 26, n. 93. *Northwestern Electric Co. v. Federal Power Commission* (1944) 321 U. S. 119, 88 L. Ed. 596, 64 S. Ct. 451; *Pacific Power & Light Co. v. Federal Power Commission* (C. C. A. 9th, 1944) 141 F. (2d) 602.

p. 26, n. 94. *Northwestern Electric Co. v. Federal Power Commission* (1944) 321 U. S. 119, 88 L. Ed. 596, 64 S. Ct. 451.

The statutory delegation may authorize an administrative order requiring the keeping of a uniform system of accounts which does not prevent a company subject to those requirements from keeping additional accounts setting out information not permitted under the uniform system. *Northwestern Electric Co. v. Federal Power Commission* (1944) 321 U. S. 119, 88 L. Ed. 596, 64 S. Ct. 451. See also § 600.

A delegation requiring uniform accounts cannot violate the right of regulation reserved to the states under the Tenth Amendment, where such right is subordinate to the appropriate exercise by Congress of the commerce power. *Northwestern Electric Co. v. Federal Power Commission* (1944) 321 U. S. 119, 88 L. Ed. 596, 64 S. Ct. 451.

§ 16A. (New) — Prescription of Forms or Documents.

Congress may delegate to an agency the discretion to prescribe by regulation forms of tax returns and make it the duty of the taxpayer to comply. *Commissioner of Internal Revenue v. Love-Wells Co.* (1944) 321 U. S. 219, 88 L. Ed. 684, 64 S. Ct. 54.

Congress may delegate to an agency the authority to prescribe uniform bills of lading, and require interstate rail carriers to adopt and observe the form and substance thereof. 49 USC 1 (6), 12, 15 (1). *Illinois Steel Co. v. Baltimore & O. R. Co.* (1944) 320 U. S. 508, 88 L. Ed. 259, 64 S. Ct. 322.

Congress may delegate to an agency the power to prescribe records and documents for corporations or persons dealing in materials covered by the system of price control. *Bowles v. Glick Bros. Lumber*

Co. (C. C. A. 9th, 1945) 146 F. (2d) 566, cert. den. 325 U. S. 877, 89 L. Ed. 1994, 65 S. Ct. 1568.

See § 495A.

§ 17. — Power to Determine Facts.

Power to "allocate such material in such manner and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense" has been held a valid delegation of legislative power, as involving only the power to determine the fact or condition for application of the law. Emergency Price Control Act of 1942. *Henderson v. Bryan* (D. C. Cal., 1942) 46 F. Supp. 682.

§ 18. — Power to Issue Licenses.

Administrative Procedure Act. "(e) LICENSE AND LICENSING.—'License' includes the whole or part of any agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission. 'Licensing' includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation amendment, modification, or conditioning of a license." (Administrative Procedure Act, Sec. 2(e).)

"(b) LICENSES.—In any case in which application is made for a license required by law the agency, with due regard to the rights or privileges of all the interested parties or adversely affected persons and with reasonable dispatch, shall set and complete any proceedings required to be conducted pursuant to sections 7 and 8 of this Act or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, no withdrawal, suspension, revocation, or annulment of any license shall be lawful unless, prior to the institution of agency proceedings therefor, facts or conduct which may warrant such action shall have been called to the attention of the licensee by the agency in writing and the licensee shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements. In any case in which the licensee has, in accordance with agency rules, made timely and sufficient application for a renewal or a new license, no license with reference to any activity of a continuing nature shall expire until such application shall have been finally determined by the agency." (Administrative Procedure Act, Sec. 9(b).)

p. 27, n. 2. Neither a state nor a municipality can limit the right to distribute religious or political literature upon a permit or license to be issued by an official who can deny it at will. *Marsh v. Alabama* (1946) 326 U. S. 501, 90 L. Ed. 265, 66 S. Ct. 276. See *Tucker v. Texas* (1946) 326 U. S. 517, 90 L. Ed. 274, 66 S. Ct. 274; *Bratton v. Chandler* (1922) 260 U. S. 110, 67 L. Ed. 157, 43 S. Ct. 43; and see § 422.

p. 27, n. 3. See *United States v. Appalachian Electric Power Co.* (1940) 311 U. S. 377, 85 L. Ed. 243, 61 S. Ct. 291, rehearing den. 312 U. S. 712, 85 L. Ed. 1143, 61 S. Ct. 548; *Greater Kampaska Radio Corp. v. Federal Communications Commission* (1939) 71 App. D. C. 117, 108 F. (2d) 5.

The exercise by federal agencies of the power to issue licenses has been considerably expanded under such acts as the Federal Power Act. *United States*

v. Appalachian Electric Power Co. (1940) 311 U. S. 377, 85 L. Ed. 243, 61 S. Ct. 291, rehearing den. 312 U. S. 712, 85 L. Ed. 1143, 61 S. Ct. 548.

The power of license may be exercised as a weapon of the full strength of the federal government. A privilege which Congress can deny may be granted on terms and where the privilege can be denied because of the federal power over commerce these terms are limited only by the Fifth and Tenth Amendments. The license conditions must bear an obvious relationship to the commerce power. *United States v. Appalachian Electric Power Co.* (1940) 311 U. S. 377, 85 L. Ed. 243, 61 S. Ct. 291, rehearing den. 312 U. S. 712, 85 L. Ed. 1143, 61 S. Ct. 548.

Power to issue licenses is conferred upon the Price Administrator by the Emergency Price Control Act of 1942, 50 USC App. 901 et seq. (see *Di Melia v. Bowles* (C. C. A. 1st, 1945) 148 F. (2d) 725, cert. den. 325 U. S. 886, 89 L. Ed. 2000, 65 S. Ct. 1581) and upon the Civil Aeronautics Board (see *O'Carroll v. Civil Aeronautics Board* (App. D. C., 1944) 144 F. (2d) 993). A proceeding for the suspension of a license is not a criminal proceeding. *Di Melia v. Bowles* (C. C. A. 1st, 1945) 148 F. (2d) 725, cert. den. 325 U. S. 886, 89 L. Ed. 2000, 65 S. Ct. 1581.

§ 19. — Foreign Affairs.

With respect to the power of the President over foreign affairs, see note, "Jurisdiction of Circuit Court of Appeals to Review Advisory Decision" (1941) 10 *George Washington L. Rev.* 227.

p. 27, n. 5. *United States v. Rosenberg* (C. C. A. 2d, 1945) 150 F. (2d) 788, cert. den. 326 U. S. 752, 90 L. Ed. 451, 66 S. Ct. 90; *United States v. Bareno* (D. C. D. Md., 1943) 50 F. Supp. 520.

§ 19A. (New) Power to Prescribe Penalty or Punishment Not Delegable.

It is for Congress to prescribe the penalties for the laws which it writes. It would transcend both the judicial and the administrative function to make additions to those which Congress has placed behind a statute. But a suspension order which is not used as a means of punishment does not fall into this category. *L. P. Stewart & Bro. v. Bowles* (1944) 322 U. S. 398, 88 L. Ed. 1350, 64 S. Ct. 1097. See also § 81.

C. Delegates of Legislative Power

§ 20. In General.

Where authorized by statute, an administrative agency may direct a private person to promulgate regulations, the reasonableness of such regulations being an administrative question to be determined by the agency in an administrative proceeding. Where such regulations have not been found to be unreasonable by the agency, violation of the regulations may become a violation of law. *Ambassador, Inc. v. United States* (1945) 325 U. S. 317, 89 L. Ed. 1637, 65 S. Ct. 1151.

Delegation to taxpayers as a group is proper. *Helvering v. Lerner Stores Corp.* (1941) 314 U. S. 463, 86 L. Ed. 343, 62 S. Ct. 341.

Congress cannot delegate power over interstate commerce to a state or a state agency. *Safe Harbor Water Power Corp. v. Federal Power Commission* (C. C. A. 3rd, 1941) 124 F. (2d) 800.

p. 23, n. 6. See *O'Neal v. United States* (C. C. A. 6th, 1944) 140 F. (2d) 908, cert. den. 322 U. S. 729, 88 L. Ed. 1565, 64 S. Ct. 945.

p. 29, n. 9. *Dahlberg v. Pittsburgh & L. E. R. Co.* (C. C. A. 3rd, 1943) 138 F. (2d) 121. See *Yakus v. United States* (1944) 321 U. S. 414, 88 L. Ed. 834, 64 S. Ct. 660.

D. Subject of Regulation

§ 21. Subject of the Regulation Must Be Defined.

Just as the "purpose of the act" has been used as a synonym for the "subject" of a regulation, the phrase "legislative objective" has been likewise used. The legislative objective or subject of the regulation is adequately stated in a statute which seeks to prevent wartime inflation and its enumerated disruptive causes and effects. *Yakus v. United States* (1944) 321 U. S. 414, 88 L. Ed. 834, 64 S. Ct. 660.

p. 30, n. 16. See *Opp Cotton Mills, Inc. v. Administrator of Wage & Hour Division* (1941) 312 U. S. 126, 85 L. Ed. 624, 61 S. Ct. 524.

E. Standards

§ 22. Statute Must Establish Standards Limiting the Delegate.

Standards are necessary to ascertain whether the delegate has acted in compliance with the legislative will. *Yakus v. United States* (1944) 321 U. S. 414, 88 L. Ed. 834, 64 S. Ct. 660.

The standards requirement may be met by the subsequent ratification by Congress of an Executive Order which set forth proper standards, where Congress had before it the order and the facts of the situation, and where a national emergency required immediate action. *Kiyoshi Hirabayashi v. United States* (1943) 320 U. S. 81, 87 L. Ed. 1774, 63 S. Ct. 1375.

p. 30, n. 18. *Yakus v. United States* (1944) 321 U. S. 414, 88 L. Ed. 834, 64 S. Ct. 660.

p. 30, n. 19. See *McLean Trucking Co. v. United States* (1944) 321 U. S. 67, 88 L. Ed. 544, 64 S. Ct. 570.

p. 30, n. 20. *Commissioner of Internal Revenue*. See *Helvering v. Lerner Stores Corp.* (1941) 314 U. S. 463, 86 L. Ed. 343, 62 S. Ct. 341, upholding the constitutionality of the Capital Stock and excess profits tax statutes.

National Labor Relations Board. *Pittsburgh Plate Glass Co. v. National Labor Relations Board* (1941) 313 U. S. 146, 85 L. Ed. 1251, 61 S. Ct. 908, rehearing den. 313 U. S. 599, 85 L. Ed. 1551, 61 S. Ct. 1093.

The President. See *United States v. Rosenberg* (C. C. A. 2d, 1945) 150 F. (2d) 788, cert. den. 326 U. S. 752, 90 L. Ed. 451, 66 S. Ct. 90.

Price Administrator. *O'Neal v. United States* (C. C. A. 6th, 1944) 140 F. (2d) 908, cert. den. 322 U. S. 729, 88 L. Ed. 1565, 64 S. Ct. 945.

Securities and Exchange Commission. *Commonwealth & Southern Corp. v. Securities & Exchange Commission* (C. C. A. 3rd, 1943) 134 F. (2d) 747.

p. 31, n. 21. *Opp Cotton Mills, Inc. v. Administrator of Wage & Hour Division* (1941) 312 U. S. 126, 85 L. Ed. 624, 61 S. Ct. 524; *Taylor v. Brown* (Em. App., 1943) 137 F. (2d) 654, cert. den. 320 U. S. 787, 88 L. Ed. 473, 64 S. Ct. 194.

§ 23. — Adequate Standards: Examples.

The Wagner Act requires the National Labor Relations Board, in determining the proper bargaining unit for a particular industry, to work within the area covered by the words "employer," "plant" and "craft," and requires that the unit selected be one suitable to ef-

fectuate the policies of the act. Since that policy is elaborately stated, there is an adequate standard. *Pittsburgh Plate Glass Co. v. National Labor Relations Board* (1941) 313 U. S. 146, 85 L. Ed. 1251, 61 S. Ct. 908, rehearing den. 313 U. S. 599, 85 L. Ed. 1551, 61 S. Ct. 1093.

Where the basic facts to be ascertained administratively are whether the prescribed wage as applied to an industry will substantially curtail employment, and whether to attain the legislative end there is need for wage differentials applicable to classes in industry, and where the factors to be considered in arriving at these determinations are those which are relevant to or have a bearing on the statutory objectives, there are adequate standards. *Opp Cotton Mills, Inc. v. Administrator of Wage & Hour Division* (1941) 312 U. S. 126, 85 L. Ed. 624, 61 S. Ct. 524.

Under the Emergency Price Control Act, 50 USC App. 901 et seq., as amended by the Inflation Control Act, 50 USC App. 961 et seq., Congress made a valid delegation to the Price Administrator of its power to prescribe commodity prices as a war emergency measure. In the Act are included a statement of the legislative objective, the method of achieving this objective, that is, through commodity price fixing, and the standards laid down for the guidance of the administrative agency. *Yakus v. United States* (1944) 321 U. S. 414, 88 L. Ed. 834, 64 S. Ct. 660.

Adequate standards were set up by a statute authorizing the President to prohibit the export of munitions or supplies of war whenever he "determines that it is necessary in the interest of national defense." *United States v. Rosenberg* (C. C. A. 2d, 1945) 150 F. (2d) 788, cert. den. 326 U. S. 752, 90 L. Ed. 451, 66 S. Ct. 90.

Where the President is authorized to act when he is satisfied that a shortage of material will exist to the extent that he shall deem necessary in the public interest and to promote the national defense, adequate standards are provided. *O'Neal v. United States* (C. C. A. 6th, 1944) 140 F. (2d) 908, cert. den. 322 U. S. 729, 88 L. Ed. 1565, 64 S. Ct. 945.

Where the Securities and Exchange Commission is authorized to revoke brokers' licenses on a finding of "manipulative, deceptive or otherwise fraudulent" practices, the standards are adequate. *Charles Hughes & Co. v. Securities & Exchange Commission* (C. C. A. 2d, 1943) 139 F. (2d) 434, cert. den. 321 U. S. 786, 88 L. Ed. 1077, 64 S. Ct. 781.

p. 32, n. 23. *Ecker v. Western Pacific R. Corp.* (1943) 318 U. S. 448, 87 L. Ed. 892, 63 S. Ct. 692.

§ 25. Standards Require Findings.

p. 34, n. 33. * *City of Yonkers v. United States* (1944) 320 U. S. 685, 88 L. Ed. 400, 64 S. Ct. 327. See *Western-Central Motor Carriers Ass'n v. United States* (1944) 321 U. S. 194, 88 L. Ed. 668, 64 S. Ct. 499 and *McLean Trucking Co. v. United States* (1944) 321 U. S. 67, 88 L. Ed. 544, 64 S. Ct. 370.

A reviewing court will set aside the determination of an administrative agency when the facts found fall short of meeting statutory requirements. *Bingham's Trust v. Commissioner of Internal Revenue* (1945) 325 U. S. 365, 89 L. Ed. 1670, 65 S. Ct. 1232. See § 425A.

*F. Examples of Valid Delegation***§ 27. To the President: The Embargo Acts.****§ 29A. (New) — War Powers.**

Congress, by subsequent legislation, may approve action by the President in a time of national emergency. This subsequent approval with full knowledge of the facts constitutes a ratification of the President's action and dispenses with the requirement of a prior valid delegation of power. *Kiyoshi Hirabayashi v. United States* (1943) 320 U. S. 81, 87 L. Ed. 1774, 63 S. Ct. 1375.

Delegation to the President of the authority to prohibit the export of munitions or supplies of war when he determines that it is necessary in the interests of national defense is a valid delegation. *United States v. Rosenberg* (C. C. A. 2d, 1945) 150 F. (2d) 788, cert. den. 326 U. S. 752, 90 L. Ed. 451, 66 S. Ct. 90.

Congress may validly delegate to the President the power to set up a system whereby conscientious objectors are put to work of national importance. *Weightman v. United States* (C. C. A. 1st, 1944) 142 F. (2d) 188.

§ 33. To the Interstate Commerce Commission.

The Commission has been entrusted with a wide range of discretionary power for the performance of its function as guardian of the public interest in determining whether certificates of convenience and necessity shall be granted. *United States v. Detroit & Cleveland Navigation Co.* (1945) 326 U. S. 236, 90 L. Ed. 38, 66 S. Ct. 75.

p. 39, n. 66. *Mitchell v. United States* (1941) 313 U. S. 80, 85 L. Ed. 1201, 61 S. Ct. 873.

p. 40, n. 67. *Interstate Commerce Commission v. Parker* (1945) 326 U. S. 60, 89 L. Ed. 2051, 65 S. Ct. 1490. See also § 564 et seq., particularly § 568.

§ 36A. (New) To the National Labor Relations Board.

By the National Labor Relations Act the Board has been delegated the exclusive authority to prevent unfair labor practices. *May Department Stores Co. v. National Labor Relations Board* (1945) 326 U. S. 376, 90 L. Ed. 145, 66 S. Ct. 203; and also the power to determine an appropriate bargaining unit. *Pittsburgh Plate Glass Co. v. National Labor Relations Board* (1941) 313 U. S. 146, 85 L. Ed. 1251, 61 S. Ct. 908, rehearing den. 313 U. S. 599, 85 L. Ed. 1551, 61 S. Ct. 1093.

§ 36B. (New) To the Price Administrator.

The Emergency Price Control Act, 50 USC App. 901 et seq. as amended by the Inflation Control Act, 50 USC App. 961 et seq., provides for the establishment of the Office of Price Administration under the direction of a Price Administrator appointed by the President, and sets up a comprehensive scheme for the promulgation by the Administrator of regulations fixing maximum prices of commodities and rents which will effectuate the purposes of the Act. This was in

exercise of Congress' constitutional power to prescribe commodity prices as a war emergency measure. *Yakus v. United States* (1944) 321 U. S. 414, 88 L. Ed. 834, 64 S. Ct. 660.

III. PROCEDURAL DUE PROCESS

§ 38. In General.

Congress may insert a procedural provision in a statute designed to protect the public interest if a court of equity could impose a similar condition, in the exercise of its discretion to protect the public interest, even though this results in substantial injury to private interests. *Yakus v. United States* (1944) 321 U. S. 414, 88 L. Ed. 834, 64 S. Ct. 660.

The statutory denial of a right to a restraining order or interlocutory injunction to one who has failed to apply for available administrative relief, not shown to be inadequate, is not a denial of due process. *Yakus v. United States* (1944) 321 U. S. 414, 88 L. Ed. 834, 64 S. Ct. 660. See also § 213 et seq. and § 736.

Where a statute sets up a committee with power to make a report and recommendation, but not an order, and does not require the committee to conduct a quasi-judicial proceeding upon notice and hearing, failure to afford a hearing is no denial of due process. The demands of due process do not require a hearing at the initial stage or at any particular point or at more than one point in an administrative proceeding so long as the requisite hearing is held before the final order becomes effective. Where the statute provides for proceedings before the Administrator which satisfy the requirements of due process, no such proceedings before the committee need be required. *Opp Cotton Mills, Inc. v. Administrator of Wage & Hour Division* (1941) 312 U. S. 126, 85 L. Ed. 624, 61 S. Ct. 524.

p. 43, n. 87. *Morrison-Knudson Co. v. State Board of Equalization of Wyoming* (D. C. D. Wyo., 1940) 35 F. Supp. 553.

p. 43, n. 88. See *Yakus v. United States* (1944) 321 U. S. 414, 88 L. Ed. 834, 64 S. Ct. 660.

p. 43, n. 89. See *Yakus v. United States* (1944) 321 U. S. 414, 88 L. Ed. 834, 64 S. Ct. 660.

§ 39. Statutes Which Deny Procedural Due Process.

The restriction of judicial review of an administrative determination to a single court does not deny due process, so long as there is a reasonable opportunity to be heard and present evidence. *Yakus v. United States* (1944) 321 U. S. 414, 88 L. Ed. 834, 64 S. Ct. 660. See also § 632.

p. 43, n. 92. See *Lockerty v. Phillips* (1943) 319 U. S. 182, 87 L. Ed. 1339, 63 S. Ct. 1019.

§ 40. Procedural Due Process: Examples.

Where a statute provides full opportunity to be heard and introduce evidence in state condemnation proceedings, taking into account alterations in the property after the taking and before the review,

and further provides that the award is subject to judicial review, and upon such review the award may be set aside if plainly wrong or without support in the evidence, there is no denial of due process and no substantial constitutional question is raised. *Bailey v. Anderson* (1945) 326 U. S. 203, 90 L. Ed. 3, 66 S. Ct. 66.

A statute does not deny due process to the person attacking an administrative determination merely because of inconvenience, where it requires that the protest be made to the agency in Washington, D. C. *Yakus v. United States* (1944) 321 U. S. 414, 88 L. Ed. 834, 64 S. Ct. 660.

The legislative formulation of what would otherwise be a rule of judicial discretion is not a denial of due process of law or a usurpation of judicial functions. Thus Congress in the public interest may postpone injunctive relief against a price regulation where a court of equity in its discretion and in the same interest might have done likewise. *Yakus v. United States* (1944) 321 U. S. 414, 88 L. Ed. 834, 64 S. Ct. 660.

The Emergency Price Control Act of 1942 (see also § 36B), authorizes any person subject to a regulation promulgated by the Price Administrator to file a "protest" within 60 days of its publication in the Federal Register. The Administrator, within 90 days of such publication, must either grant or deny the protest, in whole or in part, notice the protest for hearing, or provide for taking further evidence. A denial must include a statement of the grounds thereof. Any person aggrieved by a ruling on the protest may appeal to the Emergency Court of Appeals, and finally to the Supreme Court. It is not a defect of due process that the hearing is provided after, rather than before, the promulgation of the regulation, that there is no right to a stay pending the statutory proceedings to review its validity nor that jurisdiction to review such validity is vested exclusively in the Emergency Court of Appeals, although other federal and state courts have jurisdiction to enforce the regulation. *Yakus v. United States* (1944) 321 U. S. 414, 88 L. Ed. 834, 64 S. Ct. 660. *Bowles v. Willingham* (1944) 321 U. S. 503, 88 L. Ed. 892, 64 S. Ct. 641.

A statute which does not provide for interlocutory relief pending administrative proceedings does not necessarily violate the due process clause. *Taylor v. Brown* (Em. App., 1943) 137 F. (2d) 654, cert. den. 320 U. S. 787, 88 L. Ed. 473, 64 S. Ct. 194.

Congress infringed no constitutional right by withholding judicial review of a classification by the local draft board until the administrative process by which a registrant under the Selective Service Act (see § 649B) enters the national service has been completed, either by induction into the armed services, or in the case of a conscientious objector, by acceptance into a civilian public service camp. *Falbo v. United States* (1944) 320 U. S. 549, 88 L. Ed. 305, 64 S. Ct. 346.

Congress would have been under no necessity to give notice and provide a hearing before it acted, had it decided to fix rents or commodity prices on a national basis. It is impractical and the Constitution does not require that everyone should have a direct voice in the adoption of a rule of conduct affecting more than a few people. Accordingly there is no denial of due process in the postponement of

judicial review until after a price or rent regulation has become effective. *Bowles v. Willingham* (1944) 321 U. S. 503, 88 L. Ed. 892, 64 S. Ct. 641.

Where only property rights are involved, mere postponement of the judicial inquiry is not a denial of due process if the opportunity given for the ultimate judicial determination is adequate. Delay in the judicial determination of property rights is not uncommon where it is essential that governmental needs be immediately satisfied. *Bowles v. Willingham* (1944) 321 U. S. 503, 88 L. Ed. 892, 64 S. Ct. 641. See also § 501.

A statute which provides a period of 60 days following the promulgation of a price regulation in which to file protest, in addition to the right to apply to the Emergency Court of Appeals for leave to introduce additional evidence "which could not reasonably" have been offered in the proceeding before the Administrator, was not a denial of due process. *Yakus v. United States* (1944) 321 U. S. 414, 88 L. Ed. 834, 64 S. Ct. 660.

p. 45, n. 97. *Morrison-Knudson Co. v. State Board of Equalization of Wyoming* (D. C. D. Wyo., 1940) 35 F. Supp. 553.

IV. EXERCISE OF THE JUDICIAL POWER

A. In General: Judicial Review

§ 41. In General.

The supremacy of law, a doctrine under which the ordinary courts are empowered to control governmental officials and agencies to the extent of holding them to the law, is embodied in Article III of the Constitution. The right of judicial review to determine the legality of the acts of government officials and agencies is thus a constitutional right, not one dependent upon statutory enactment. This powerful doctrine is the backbone of administrative law in the United States and is fundamental to our entire system of government. See §§ 3, 650, 688, 704, 707, 708, 710.

The power of an administrative agency is circumscribed by the authority granted by Congress in the controlling statute. This permits the courts to participate in law enforcement entrusted to administrative agencies to protect justiciable individual rights against unauthorized administrative action. The responsibility of determining the statutory limits of administrative authority in such cases is a judicial function under Article III of the Constitution. *Stark v. Wickard* (1944) 321 U. S. 288, 88 L. Ed. 733, 64 S. Ct. 559.

Apart from the requirements of the Constitution, when judicial review is available and under what circumstances, are questions which depend on the particular Congressional enactment under which judicial review is authorized. See § 632.

p. 46, n. 1. *Watson Bros. Transp. Co. v. Jaffa* (C. C. A. 8th, 1944) 143 F. (2d) 340.

p. 46, n. 5. * *Social Security Board v. Nierotko* (1946) 327 U. S. 358, 90 L. Ed. 718, 66 S. Ct. 637. See *Estep v. United States* (1946) 327 U. S. 114, 90 L. Ed. 567, 66 S. Ct. 423; *Scripps-Howard Radio, Inc. v. Federal Communications Commission* (1942) 316 U. S. 4, 86 L. Ed. 1229, 62 S. Ct. 875.

The review by the courts of questions of law affecting private rights, that is, judicial questions, is discussed in more detail in § 425 et seq.

p. 49, n. 9. *Stark v. Wickard*, 321 U. S. 288, 88 L. Ed. 733, 64 S. Ct. 559.

p. 50, n. 13. See *Estep v. United States* (1946) 327 U. S. 114, 90 L. Ed. 567, 66 S. Ct. 423.

§ 43. A Requisite of Statutory Administrative Schemes.

The contention that a statute which allowed judicial review of an administrative determination to one party to a controversy, but not to the other party, violated the second party's rights under the Fifth Amendment, was raised but not passed upon by the court in *Elgin, J. & E. R. Co. v. Burley* (1945) 325 U. S. 711, 89 L. Ed. 1886, 65 S. Ct. 1282.

The contention that an award by the National Railroad Adjustment Board was final and not subject to judicial review was made but not passed upon by the court in *Elgin, J. & E. R. Co. v. Burley* (1945) 325 U. S. 711, 89 L. Ed. 1886, 65 S. Ct. 1282.

Whether Congress could validly create a definite personal statutory right against a fund handled by a federal agency and yet limit its enforceability to administrative determination, excluding review by federal courts, was left unconsidered in *Stark v. Wickard* (1944) 321 U. S. 288, 88 L. Ed. 733, 64 S. Ct. 559.

The Constitution does not guarantee one the right to select his tribunal or method of procedure. *Dodez v. United States* (C. C. A. 6th, 1946) 154 F. (2d) 637.

A statutory scheme of administrative procedure which does not deny the opportunity to raise and preserve, throughout the proceeding, any due process objection to the statute, the regulations, or the procedure, and to secure full judicial review thereof, violates no constitutional right of due process. *Yakus v. United States* (1944) 321 U. S. 414, 88 L. Ed. 834, 64 S. Ct. 660. See *Bowles v. Willingham* (1944) 321 U. S. 503, 88 L. Ed. 892, 64 S. Ct. 641.

p. 51, n. 21. Judicial review may be required by the Constitution in an appropriate case. See § 41. And the silence of Congress as to judicial review is not necessarily to be construed as a denial of the power of federal courts to grant relief in the exercise of the general jurisdiction which Congress has conferred upon them. Apart from constitutional requirements, the question whether judicial review will be provided where Congress is silent depends on the whole setting of the particular statute and the scheme of regulation which is adopted. * *Estep v. United States* (1946) 327 U. S. 114, 90 L. Ed. 567, 66 S. Ct. 423. See § 650. Hence procedural statutes and the procedural approach are of very great importance, and there are many methods of obtaining judicial review in appropriate cases. See § 246 et seq. for a summary of the various methods.

The fact that a statute provides that an administrative order is to be "final" does not mean that Congress intended to preclude judicial review, but rather that the courts are not to weigh the evidence to determine whether a particular order is erroneous. The order is final even though it may be erroneous. But it is invalid if it exceeds the jurisdiction of the agency. * *Estep v. United States* (1946) 327 U. S. 114, 90 L. Ed. 567, 66 S. Ct. 423. See also § 449 et seq.

See *United States v. Pitt* (C. C. A. 3rd, 1944) 144 F. (2d) 169.

*B. (Changed) Legislative or Administrative Review***§ 45. In General.**

Legislative and administrative review amount to the same thing, that is, a *de novo*, appellate review, on both the facts and the law, by the superior administrative tribunal or legislative court. See the cases cited *post*, this section, and § 243. It is not judicial review and indeed is in profound contrast to it. See §§ 3, 41.

On legislative or administrative review the appellate administrative body must consider the regulation or order *de novo*, on the administrative record including any new or additional evidence, and upon such reconsideration dispose of the proceeding in such a way as may thus appear to be in accord with the facts and the law.

Alcohol Beverage Control Board of the District of Columbia. *Lambros v. Young* (App. D. C., 1944) 145 F. (2d) 341.

Price Administrator. *Ladner v. Bowles* (Em. App., 1944) 142 F. (2d) 566; *Smith v. Bowles* (Em. App., 1944) 142 F. (2d) 63.

Selective Service Boards. *United States v. Pitt* (C. C. A. 3rd, 1944) 144 F. (2d) 169. See *United States ex rel. Reel v. Badt* (C. C. A. 2d, 1944) 141 F. (2d) 845.

Where an appellate administrative agency has determined the facts *de novo*, the fact that the lower agency failed to afford a fair hearing does not impair the determination. *Bowles v. United States* (1943) 319 U. S. 33, 87 L. Ed. 1194, 63 S. Ct. 912, rehearing den. 319 U. S. 785, 87 L. Ed. 1728, 63 S. Ct. 1323.

An appellate administrative agency is not bound to accept the findings made by a hearing officer, but in order to clarify the result on judicial review, it should indicate whether or not the findings were accepted. *United States ex rel. Reel v. Badt* (C. C. A. 2d, 1944) 141 F. (2d) 845.

For burden of proof on legislative or administrative review, see § 169.

p. 54, n. 38. *Acer Realty Co. v. Commissioner of Internal Revenue* (C. C. A. 6th, 1942) 132 F. (2d) 512. See *Bowles v. United States* (1943) 319 U. S. 33, 87 L. Ed. 1194, 63 S. Ct. 912, rehearing den. 319 U. S. 785, 87 L. Ed. 1728, 63 S. Ct. 1323.

Administrative Procedure Act. See the Administrative Procedure Act, Sec. 8(a).

See § 227 et seq.

p. 55, n. 43. *Pope v. United States* (1944) 323 U. S. 1, 89 L. Ed. 3, 65 S. Ct. 16.

p. 56, n. 45. As in the case of the courts for the District of Columbia, Congress, notwithstanding the retention of administrative duties by the Court of Claims, has provided for appellate review of its judgments rendered in its judicial capacity. See *Pope v. United States* (1944) 323 U. S. 1, 89 L. Ed. 3, 65 S. Ct. 16.

§ 46. Statutes Which Provide for Legislative Review.

The Emergency Price Control Act provides for administrative review by area and regional administrators and by the Price Adminis-

trator in Washington. 50 USC App. 901 et seq. *Smith v. Bowles* (Em. App., 1944) 142 F. (2d) 63.

p. 57, n. 53. *Pope v. United States* (1944) 323 U. S. 1, 89 L. Ed. 3, 65 S. Ct. 16.

§ 47. Legislative Courts.

p. 59, n. 65. A suit to enforce a legal obligation is not any less a case or controversy upon which a court possessing federal powers may give judgment because the claim is uncontested or uncontestable. *Pope v. United States* (1944) 323 U. S. 1, 89 L. Ed. 3, 65 S. Ct. 16.

§ 48. Legislative Courts May Also Afford Judicial Review.

The determination of the amount due under an obligation created by Congress, where such amount depends upon data to be ascertained which by the terms of the obligation are its measure, is a judicial function. *Pope v. United States* (1944) 323 U. S. 1, 89 L. Ed. 3, 65 S. Ct. 16.

p. 59, n. 66. * *Pope v. United States* (1944) 323 U. S. 1, 89 L. Ed. 3, 65 S. Ct. 16.

p. 59, n. 67. *Pope v. United States* (1944) 323 U. S. 1, 89 L. Ed. 3, 65 S. Ct. 16.

p. 61, n. 73. A suit to enforce a legal obligation is not any less a case or controversy for judicial decision because the claim is uncontested or uncontestable. *Pope v. United States* (1944) 323 U. S. 1, 89 L. Ed. 3, 65 S. Ct. 16.

C. Infliction of Penalties Pending Review

§ 49. Pending Judicial Review.

A statute setting up an administrative procedure which may make a party liable to criminal prosecution pending judicial review is valid where the agency has discretion to suspend enforcement pending review and the balance of public interest required rapidly and uniformly enforced regulations to prevent a greater danger, such as war-time inflation. *Yakus v. United States* (1944) 321 U. S. 414, 88 L. Ed. 834, 64 S. Ct. 660.

p. 63, n. 81. *East Ohio Gas Co. v. Federal Power Commission* (C. C. A. 6th, 1940) 115 F. (2d) 385.

§ 50. Pending Legislative Review.

p. 63, n. 82. *La Verne Co-operative Citrus Ass'n v. United States* (C. C. A. 9th, 1944) 143 F. (2d) 415.

CHAPTER 2

NATURE OF THE ADMINISTRATIVE PROCESS

I. IN GENERAL

§ 51. General Function of Administrative Process Is to Complete the Legislative Process.

An administrative agency exists not primarily to adjudge private rights, but to act in a public capacity in order to give effect to the

declared public policy of a statute. *Phelps Dodge Corp. v. National Labor Relations Board* (1941) 313 U. S. 177, 85 L. Ed. 1271, 61 S. Ct. 845, 133 A. L. R. 1217. See *National Labor Relations Board v. Williamson-Dickie Co.* (C. C. A. 5th, 1942) 130 F. (2d) 260 and *National Labor Relations Board v. Thompson Products* (C. C. A. 6th, 1942) 130 F. (2d) 363.

p. 65, n. 1. *National Labor Relations Board v. T. W. Phillips Gas & Oil Co.* (C. C. A. 3rd, 1944) 141 F. (2d) 304.

p. 65, n. 2. See *New York State Guernsey Breeders' Corp. v. Wickard* (C. C. A. 2d, 1944) 141 F. (2d) 805, cert. den. 323 U. S. 725, 89 L. Ed. 582, 65 S. Ct. 58.

p. 65, n. 3. See *Binkley Mining Co. v. Wheeler* (C. C. A. 8th, 1943) 133 F. (2d) 863, cert. den. 319 U. S. 764, 87 L. Ed. 1715, 63 S. Ct. 1326.

p. 66, n. 5. *Addison v. Holly Hill Fruit Products* (1944) 322 U. S. 607, 88 L. Ed. 1488, 64 S. Ct. 1215; *Phelps Dodge Corp. v. National Labor Relations Board* (1941) 313 U. S. 177, 85 L. Ed. 1271, 61 S. Ct. 845, 133 A. L. R. 1217. See also § 507.

§ 52. Administrative Process Contrasted with Judicial Process.

p. 67, n. 9. *Watson Bros. Transp. Co. v. Jaffa* (C. C. A. 8th, 1944) 143 F. (2d) 340; *Drumheller v. Berks County Local Board No. 1* (C. C. A. 3rd, 1942) 130 F. (2d) 610.

§ 53. General Rules for Validity of Administrative Schemes.

§ 54. — To Determine Claims Against the United States.

p. 68, n. 17. See *Wilson & Co., Inc. v. United States* (1940) 311 U. S. 104, 85 L. Ed. 71, 61 S. Ct. 120.

II. ADMINISTRATIVE INVESTIGATION

§ 57. In General.

Administrative investigations are to be distinguished from hearings. They may be conducted privately and without counsel or a reporter. A court, in granting enforcement on a subpoena cannot impose conditions on the manner of conducting the investigation in aid of which the subpoena was issued. *Bowles v. Baer* (C. C. A. 7th, 1944) 142 F. (2d) 787.

Administrative Procedure Act. "(b) INVESTIGATIONS.—No process, requirement of a report, inspection, or other investigative act or demand shall be issued, made, or enforced in any manner or for any purpose except as authorized by law. Every person compelled to submit data or evidence shall be entitled to retain or, on payment of lawfully prescribed costs, procure a copy or transcript thereof, except that in a nonpublic investigatory proceeding the witness may for good cause be limited to inspection of the official transcript of his testimony." (Administrative Procedure Act, Sec. 6(b).)

p. 70, n. 31. See note, "Rights of Witnesses in Administrative Investigations" (1941) 54 Harv. L. Rev. 1214, and note, "Power of Federal Commissions to Compel Testimony and the Production of Evidence" (1937) 51 Harv. L. Rev. 312.

p. 71, n. 35. *Securities & Exchange Commission v. Bourbon Sales Corp.* (D. C. W. D. Ky., 1942) 47 F. Supp. 70.

§ 59. The Subpoena Power.

An administrative agency may delegate to a regional administrator the power to make the determination of relevancy and materiality of documents whose production is required by a subpoena. *Penfield Co. of California v. Securities & Exchange Commission* (C. C. A. 9th, 1944) 143 F. (2d) 746. See § 10A.

The Price Administrator cannot delegate to a subordinate his power to issue subpoenas. *In re Mohawk Wrecking & Lumber Co.* (D. C. E. D. Mich., 1946) 65 F. Supp. 164.

Administrative agencies are invested with a quasi-judicial discretion in the issuance of subpoenas. *E. B. Muller & Co. v. Federal Trade Commission* (C. C. A. 6th, 1944) 142 F. (2d) 511.

A subpoena duces tecum directed to a corporation can be served upon the treasurer of the corporation and is not required to be directed to the particular officer served. *Nalling v. W. G. Golebiewski, Inc.* (D. C. W. D. N. Y., 1942) 47 F. Supp. 448.

Administrative Procedure Act. "(c) SUBPENAS.—Agency subpoenas authorized by law shall be issued to any party upon request and, as may be required by rules of procedure, upon a statement or showing of general relevance and reasonable scope of the evidence sought. Upon contest the court shall sustain any such subpoena or similar process or demand to the extent that it is found to be in accordance with law and, in any proceeding for enforcement, shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply." (Administrative Procedure Act, Sec. 6(c).)

p. 74, n. 49. See § 607 et seq.

§ 61. Forms of Account and Reports.

p. 75, n. 53. *Bowles v. Glick Bros. Lumber Co.* (C. C. A. 9th, 1945) 146 F. (2d) 566, cert. den. 325 U. S. 877, 89 L. Ed. 1994, 65 S. Ct. 1568; *Louisville Gas & Electric Co. v. Federal Power Commission* (C. C. A. 6th, 1942) 129 F. (2d) 126, cert. den. 318 U. S. 761, 87 L. Ed. 1133, 63 S. Ct. 659.

p. 75, n. 55. **Administrative Procedure Act.** See Sec. 6 (b) of the Administrative Procedure Act and §§ 16A and 57 herein.

III. ADMINISTRATIVE LEGISLATION: POWER TO MAKE RULES AND REGULATIONS

§ 64. Administrative Regulations.

Administrative Procedure Act. "(c) RULE AND RULE MAKING.—'Rule' means the whole, or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing upon any of the foregoing.

'Rule making' means agency process for the formulation, amendment, or repeal of a rule." (Administrative Procedure Act, Sec. 2(c).)

With respect to notice and hearing of proposed rule making, and the effective dates of rules, under the Administrative Procedure Act, see Sec. 4 thereof, and § 501 herein.

See James H. Ronald, "Publication of Federal Administrative Legislation" (1938) 7 George Washington L. Rev. 52.

p. 76, n. 62. * *Yakus v. United States* (1944) 321 U. S. 414, 88 L. Ed. 834, 64 S. Ct. 660. See *Columbia Broadcasting System v. United States* (1942) 316 U. S. 407, 86 L. Ed. 1563, 62 S. Ct. 1194.

See § 13.

§ 65. Administrative Rules.

Administrative Procedure Act. See the Definition of "Rule" and "Rule making" in the Administrative Procedure Act, Sec. 2(c).

p. 76, n. 65. See § 282.

§ 65A. (New) Administrative Resolutions and Minutes.

An instance of the passage of a resolution by an administrative agency is to be found in *United States v. Appalachian Electric Power Co.* (1940) 311 U. S. 377, 85 L. Ed. 243, 61 S. Ct. 291, rehearing den. 312 U. S. 712, 85 L. Ed. 1143, 61 S. Ct. 548.

Some administrative agencies pass resolutions, just as is commonly done by private corporations or groups. If the subject matter of the resolution relates to purely factual matters, it may constitute a finding on or determination of an administrative question. Where it relates to judicial questions it has no greater effect than any other administrative decision of a question of law. See § 73 et seq. and § 425.

A "minute" was handed down by the Federal Communications Commission for the purpose of setting up a procedure for testing the validity of certain regulations in the courts. It also served to declare the intentions of the Commission in connection with the subject matter. *Columbia Broadcasting System v. United States* (1942) 316 U. S. 407, 86 L. Ed. 1563, 62 S. Ct. 1194.

For another instance of a minute of an administrative agency, see *Social Security Board v. Nierotko* (1946) 327 U. S. 358, 90 L. Ed. 718, 66 S. Ct. 637.

IV. ADMINISTRATIVE DETERMINATION: POWER TO DETERMINE QUESTIONS OF FACT

§ 68. Determination of Administrative Questions: Legislative Discretion.

With respect to the range of discretionary authority of an administrative agency in determining administrative questions, see *United States v. Detroit & Cleveland Navigation Co.* (1943) 326 U. S. 236, 90 L. Ed. 38, 66 S. Ct. 75.

Administrative Procedure Act. "'Adjudication' means agency process for the formulation of an order." (Administrative Procedure Act, Sec. 2(d).)

p. 78, n. 75. The discretion of the Commission should be exercised after consideration of all relevant information. *American Trucking Ass'n, Inc. v. United States* (1945) 326 U. S. 77, 89 L. Ed. 2065, 65 S. Ct. 1499. See § 507.

Quotation. "The phrase 'establish to the satisfaction of the Commission' does not mean that the Commission may either capriciously extend the unlisted trading privilege to a security upon the application of an exchange or whimsically withhold it. Such would constitute a breach of the Commission's discretion. What the statute requires is that the applicant exchange shall present substantial evidence to the Commission of the existence of the conditions prescribed by the section and if such evidence is presented to it the Commission must extend the privilege." Judge Biggs in *National Ass'n of Securities Dealers v. Securities & Exchange Commission* (C. C. A. 3rd, 1944) 143 F. (2d) 62.

See *Arenas v. United States* (1944) 322 U. S. 419, 88 L. Ed. 1363, 64 S. Ct. 1090 and *Perkins v. Elg* (1939) 307 U. S. 325, 83 L. Ed. 1320, 59 S. Ct. 884.

§ 70. Quasi-Judicial Determinations.

p. 79, n. 85. *Hudson Motor Car Co. v. Detroit* (C. C. A. 6th, 1943) 136 F. (2d) 574.

p. 80, n. 90. See *Watson Bros. Transp. Co. v. Jaffa* (C. C. A. 8th, 1944) 143 F. (2d) 340.

§ 70A. (New) — Quasi-Judicial Determinations Involving Forecasts of the Future.

Under the Interstate Commerce Act, 49 USC 309(a), the Commission is authorized to permit proposed service if it "is or will be required by the present or future public convenience and necessity." Accordingly, in determining that a service will be required in the future to meet public convenience and necessity, the Commission presently determines the probable factual requirements of the future. Such a determination is quasi-judicial, as it relates to present probabilities only; the Commission has laid down no legislative rule for the future period, its only act being to grant the certificate of convenience and necessity. *United States v. Detroit & Cleveland Navigation Co.* (1945) 326 U. S. 236, 90 L. Ed. 38, 66 S. Ct. 75.

§ 71. Quasi-Legislative Determinations.

A quasi-legislative determination is a prophecy. *Board of Trade of Kansas City, Mo. v. United States* (1942) 314 U. S. 534, 86 L. Ed. 331, 62 S. Ct. 366.

p. 81, n. 92. See *Twin City Milk Producers Ass'n v. McNutt* (C. C. A. 8th, 1941) 122 F. (2d) 564.

p. 83, n. 96. *Texas Co. v. Alton R. Co.* (C. C. A. 7th, 1940) 117 F. (2d) 210, cert. den. sub nom. *Funks Grove Grain Co. v. Alton R. Co.* (1941) 313 U. S. 570, 85 L. Ed. 1528, 61 S. Ct. 947, rehearing den. 313 U. S. 600, 85 L. Ed. 1552, 61 S. Ct. 1109.

p. 83, n. 97. *Texas Co. v. Alton R. Co.* (C. C. A. 7th, 1940) 117 F. (2d) 210, cert. den. sub nom. *Funks Grove Grain Co. v. Alton R. Co.* (1941) 313 U. S. 570, 85 L. Ed. 1528, 61 S. Ct. 947, rehearing den. 313 U. S. 600, 85 L. Ed. 1552, 61 S. Ct. 1109.

p. 83, n. 98. *Texas Co. v. Alton R. Co.* (C. C. A. 7th, 1940) 117 F. (2d) 210, cert. den. sub nom. *Funks Grove Grain Co. v. Alton R. Co.* (1941) 313 U. S. 570, 85 L. Ed. 1528, 61 S. Ct. 947, rehearing den. 313 U. S. 600, 85 L. Ed. 1552, 61 S. Ct. 1109.

§ 72. — Quasi-Legislative Determinations Limit Future Quasi-Judicial Determinations.

p. 84, n. 3. *Texas Co. v. Alton R. Co.* (C. C. A. 7th, 1940) 117 F. (2d) 210, cert. den. sub nom. *Funks Grove Grain Co. v. Alton R. Co.* (1941) 313 U. S. 570, 85 L. Ed. 1528, 61 S. Ct. 947, rehearing den. 313 U. S. 600, 85 L. Ed. 1552, 61 S. Ct. 1109.

§ 72A. (New) Legal Effect of Determinations.

Ordinarily administrative determinations or findings are given legal effect by sanctions imposed by administrative order. See §§ 260, 437, 550 et seq. and § 564 et seq.

Sometimes, however, an administrative determination is given certain legal effect by statute. For instance, a "Declaration of Taking" by the Secretary of War was held to vest, by statute, title to certain lands in the United States, so that a subsequent amended declaration stating that he did not intend to take title to oil, gas and mineral rights in the land was held to be ineffective. *United States v. 16,572 Acres of Land, More or Less* (S. C. Tex., 1942) 45 F. Supp. 23.

V. ADMINISTRATIVE DECISION: INITIAL DECISIONS ON QUESTIONS OF LAW

§ 73. Statutory Basis and Procedural Nature of the Function.

p. 85, n. 9. See *Bingham's Trust v. Commissioner of Internal Revenue* (1945) 325 U. S. 365, 89 L. Ed. 1670, 65 S. Ct. 1232 and *Mr. Justice Roberts* dissenting in *National Labor Relations Board v. Hearst Publications* (1944) 322 U. S. 111, 88 L. Ed. 1170, 64 S. Ct. 851.

Administrative Procedure Act. Under the Administrative Procedure Act, Sec. 8 (b), agencies are required to state "findings and conclusions . . . upon all the material issues of fact, law, or discretion presented on the record"

p. 85, n. 10. *Dobson v. Commissioner of Internal Revenue* (1943) 320 U. S. 489, 88 L. Ed. 248, 64 S. Ct. 239; *Hormel v. Helvering* (1941) 312 U. S. 552, 85 L. Ed. 1037, 61 S. Ct. 719. See *Bingham's Trust v. Commissioner of Internal Revenue* (1945) 325 U. S. 365, 89 L. Ed. 1670, 65 S. Ct. 1232 and § 423 et seq.

§ 74. Constitutional Limitation on the Function: Initial Decision May Never Be Binding.

p. 86, n. 18. *Social Security Board v. Nierotko* (1946) 327 U. S. 358, 90 L. Ed. 718, 66 S. Ct. 637. See *Bingham's Trust v. Commissioner of Internal Revenue* (1945) 325 U. S. 365, 89 L. Ed. 1670, 65 S. Ct. 1232.

§ 75. Effect on Administrative Law; The Separation of Powers.

See *Switchmen's Union of North America v. National Mediation Board* (1943) 320 U. S. 297, 88 L. Ed. 61, 64 S. Ct. 95 and *Reconstruction Finance Corp. v. Bankers Trust Co.* (1943) 318 U. S. 163, 87 L. Ed. 680, 63 S. Ct. 515.

VI. ADMINISTRATIVE SANCTIONS: POWER TO APPLY THE LEGISLATIVE MANDATE

§ 76. In General.

Judicial review of administrative sanctions is discussed in § 260.

p. 89, n. 26. *Phelps Dodge Corp. v. National Labor Relations Board* (1941) 313 U. S. 177, 85 L. Ed. 1271, 61 S. Ct. 845, 133 A. L. R. 1217.

§ 77. Administrative Sanction, Being Legislative, Is Subject to Constitutional Limitations.

p. 89, n. 27. *Phelps Dodge Corp. v. National Labor Relations Board* (1941) 313 U. S. 177, 85 L. Ed. 1271, 61 S. Ct. 845, 133 A. L. R. 1217.

§ 79. Administrative Sanction Determines Time of Legislative Action.

Merely by conferring authority on the Interstate Commerce Commission to regulate car service in an "emergency," Congress did not intend to restrict the exercise, otherwise lawful, of state power to regulate train lengths before the Commission finds an "emergency" to exist. *Southern Pac. Co. v. Arizona ex rel. Sullivan* (1945) 325 U. S. 761, 89 L. Ed. 1915, 65 S. Ct. 1515. See also § 563A.

p. 90, n. 35. *Southern Pac. Co. v. Arizona ex rel. Sullivan* (1945) 325 U. S. 761, 89 L. Ed. 1915, 65 S. Ct. 1515.

§ 81. (Changed) No Power to Inflict Punishment and Imprisonment. Penalties.

It is for Congress to prescribe the penalties for the laws which it writes. Hence where Congress prescribes remedies for violation of an Act its administrative agency may not impose punitive or penal sanctions, but is confined to the imposition of sanctions which have an essentially remedial character, although they may have an incidental penalizing effect.

National Labor Relations Board. **Republic Steel Corp. v. National Labor Relations Board* (1940) 311 U. S. 7, 85 L. Ed. 6, 61 S. Ct. 77; *National Labor Relations Board v. American Creosoting Co.* (C. C. A. 6th, 1943) 139 F. (2d) 193, cert. den. 321 U. S. 797, 88 L. Ed. 1086, 64 S. Ct. 937; **National Labor Relations Board v. Southwestern Greyhound Lines* (C. C. A. 8th, 1942) 126 F. (2d) 883; *National Labor Relations Board v. United States Truck Co.* (C. C. A. 6th, 1942) 124 F. (2d) 887. See *National Labor Relations Board v. Williamson-Dickie Mfg. Co.* (C. C. A. 5th, 1942) 130 F. (2d) 260.

Price Administrator. **L. P. Stewart & Bro. v. Bowles* (1944) 322 U. S. 398, 88 L. Ed. 1350, 64 S. Ct. 1097; *In re Rocillo* (D. C. E. D. N. Y., 1945) 61 F. Supp. 94; **Perkins v. Brown* (D. C. S. D. Ga., Savannah Div., 1943) 53 F. Supp. 176. See *Brown v. Wilemon* (C. C. A. 5th, 1944) 139 F. (2d) 730, cert. den. 322 U. S. 748, 88 L. Ed. 1579, 64 S. Ct. 1151.

Secretary of Agriculture. *Nichols & Co. v. Secretary of Agriculture* (C. C. A. 1st, 1942) 131 F. (2d) 651. See *Nelson v. Secretary of Agriculture* (C. C. A. 7th, 1943), 133 F. (2d) 453.

Securities and Exchange Commission. *Wright v. Securities & Exchange Commission* (C. C. A. 2d, 1940) 112 F. (2d) 89.

War Production Board. **B. Simon Hardware Co. v. Nelson* (D. C. D. C., 1943) 52 F. Supp. 474.

An administrative order directing the reimbursement to employees of dues paid to a company-dominated union by payroll deductions is not penal. *Virginia Electric & Power Co. v. National Labor Relations Board* (1943) 319 U. S. 533, 87 L. Ed. 1568, 63 S. Ct. 1214.

An order prohibiting a person from selling or dealing in a commodity for a fixed period has been held not invalid as a penalty. *Brown v. Wilemon* (C. C. A. 5th, 1944) 139 F. (2d) 730, cert. den. 322 U. S. 748, 88 L. Ed. 1579, 64 S. Ct. 1151; *Nelson v. Secretary of Agriculture* (C. C. A. 7th, 1943) 133 F. (2d) 453; *In re Rocillo* (D. C. E. D. N. Y., 1945) 61 F. Supp. 94.

An order directing the reinstatement of an employee is not penal. *National Labor Relations Board v. Williamson-Dickie Mfg. Co.* (C. C. A. 5th, 1942) 130 F. (2d) 260; *National Labor Relations Board v. United States Truck Co.* (C. C. A. 6th, 1942) 125 F. (2d) 887.

See § 19A.

CHAPTER 3

ADMINISTRATIVE AGENCIES

I. IN GENERAL

§ 83. General Functions: Legislative Powers.

§ 84. — Executive Powers.

The War Production Board (the "WPB"), which closely resembles the War Industries Board of 1918, was established by Executive Order No. 9024, promulgated by President Roosevelt on January 16, 1942, 7 Fed. Reg. 329. This order was issued "By virtue of the authority vested in me by the Constitution and Statutes of the United States, as President of the United States and Commander-in-Chief of the Army and Navy . . ." and vested complete powers over the war procurement and production program upon the Board's Chairman. One source of the vast authority conferred is the grant of power to the Chief Executive in Article II of the Constitution.

By Executive Order No. 9040 promulgated on January 24, 1942, 7 Fed. Reg. 527, the functions and powers theretofore vested in the Office of Production Management (the "OPM"), in the Supply Priorities and Allocations Board, and in the President by Section 120 of the National Defense Act of 1916, 39 Stat. 166, 213, 50 USC 80, were directed to be performed and exercised by the WPB. Also, under this Order the OPM was abolished and its personnel, records, property and funds were transferred to the WPB.

The Constitution permits the President, as Commander-in-Chief in time of War, to make and enforce necessary regulations to protect critical military areas essential for national defense. See *United States v. Gordon Kiyoshi Hirabayoshi* (D. C. Wash., 1942) 46 F. Supp. 657.

III. GOVERNMENT CORPORATIONS DISTINGUISHED

§ 86. In General.

The Tennessee Valley Authority exercises predominantly an executive or administrative function. It is to be distinguished from other administrative bodies which exercise clearly quasi-legislative or quasi-judicial functions. *Morgan v. Tennessee Valley Authority* (C. C. A. 6th, 1940) 115 F. (2d) 990, cert. den. 312 U. S. 701, 85 L. Ed. 1135, 61 S. Ct. 806.

The Tennessee Valley Authority exercises an executive or administrative function in its activities, which, prior to its establishment, rested with the divisions of the executive branch of the government. It is plainly a governmental agency or instrumentality of the United States. 16 USC 831 et seq. *Tennessee Valley Authority v. Kinzer* (C. C. A. 6th, 1944) 142 F. (2d) 833.

A statute making it an offense to falsely impersonate an "officer or employee acting under the authority of the United States" does not include officers or employees of a government corporation such as the Tennessee Valley Authority. *Pierce v. United States* (1941) 314 U. S. 306, 86 L. Ed. 226, 62 S. Ct. 237.

IV. TYPES OF FUNCTIONS OF ADMINISTRATIVE AGENCIES

§ 88. Advisory Agencies.

See note, "Jurisdiction of Circuit Court of Appeals to Review Advisory Decision" (1941) 10 *George Washington L. Rev.* 227.

V. FEDERAL AGENCIES

§ 91. Introduction.

With respect to deportation cases the differences between the inspector, who acts as examiner, the Board of Immigration Appeals, and the Attorney General, have been pointed out, with specific emphasis upon the fact that where the Attorney General acts, it is he who exercises the power to deport, and is therefore an original trier of fact on the whole record. The Department of Labor and the Immigration and Naturalization Service of the Department of Justice exercise no function as such. *Bridges v. Wixon* (1945) 326 U. S. 135, 89 L. Ed. 2103, 65 S. Ct. 1443.

Administrative Procedure Act. "SEC. 2. As used in this Act—

"(a) AGENCY.—'Agency' means each authority (whether or not within or subject to review by another agency) of the Government of the United States other than Congress, the courts, or the governments of the possessions, Territories, or the District of Columbia. Nothing in this Act shall be construed to repeal delegations of authority as provided by law. Except as to the requirements of section 3, there shall be excluded from the operation of this Act (1) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them, (2) courts martial and military commissions, (3) military or naval authority

exercised in the field in time of war or in occupied territory, or (4) functions which by law expire on the termination of present hostilities, within any fixed period thereafter, or before July 1, 1947, and the functions conferred by the following statutes: Selective Training and Service Act of 1940; Contract Settlement Act of 1944; Surplus Property Act of 1944." (Administrative Procedure Act, Sec. 2(a).)

§ 93. Administrator of the Wage and Hour Division.

One of the Act's primary objectives was "a universal minimum wage of 40 cents an hour in each industry engaged in commerce or the production of goods for commerce," and to reach this level as rapidly as was "economically feasible without substantially curtailing employment." Sec. 8(a). *Gemsco, Inc. v. Walling* (1945) 324 U. S. 244, 89 L. Ed. 921, 65 S. Ct. 605.

Section 8 of the Act empowers the Administrator to convene "industry committees" which, after investigation, report to him their recommendations concerning minimum wages and reasonable classifications. The Administrator is then required by order to approve and carry into effect the committee's recommendations, after notice to interested persons and opportunity to be heard, if he finds that they "are made in accordance with law, are supported by the evidence . . . and . . . will carry out the purposes of the section"; otherwise he must disapprove them. *Gemsco v. Walling* (1945) 324 U. S. 244, 89 L. Ed. 921, 65 S. Ct. 605.

§ 93A. (New) Attorney General.

The Attorney General is an administrative agent with respect to administration of the immigration laws. See §§ 91, 97.

§ 94. Board of Tax Appeals.

As of October 22, 1942, the Board of Tax Appeals became known as "The Tax Court of the United States," 56 Stat. 957, ch. 619, Section 504 of the Revenue Act of 1942, 26 USC 1944 Supp. 1100. See *John Kelley Co. v. Commissioner of Internal Revenue* (1946) 326 U. S. 521, 90 L. Ed. 278, 66 S. Ct. 299. See also § 129A.

p. 103, n. 55. *Commissioner of Internal Revenue v. Gooch Milling & Elevator Co.* (1943) 320 U. S. 418, 88 L. Ed. 139, 64 S. Ct. 184.

§ 97. Commissioner of Immigration and Naturalization.

p. 105, n. 62. See Reuben Oppenheimer, "Recent Developments in the Deportation Process" (1938) 36 Michigan L. Rev. 355, for a comprehensive review of that subject.

p. 105, n. 66a. For a description of the procedure in deportation cases, see *Bridges v. Wixon* (1945) 326 U. S. 135, 89 L. Ed. 2103, 65 S. Ct. 1443.

§ 98A. (New) Commissioner of Patents.

Unlike other situations involving proceedings before an administrative agency, a party who is adversely affected by the determination of the Board of Appeals of the Patent Office may pursue the further administrative remedy of appeal to the Court of Customs and

Patent Appeals, or, by statute, may also pursue the alternative remedy of bill in equity in a Federal District Court to compel the Commissioner of Patents to issue the patent in question. Thus proceedings before the Patent Office differ from the great bulk of administrative proceedings in that the party adversely affected therein may, if he chooses, try out the facts *de novo* by an original suit in a Federal District Court instead of being restricted to a suit for judicial review in which he would be bound by the facts in the administrative record under the doctrine of administrative finality. *Hoover Co. v. Coe* (1945) 325 U. S. 79, 89 L. Ed. 1488, 65 S. Ct. 955. See § 509 et seq.

§ 102. Federal Alcohol Administration.

p. 107, n. 78. See *Strauss v. Berkshire* (C. C. A. 8th, 1942) 132 F. (2d) 530 and *Peoria Braumeister Co. v. Yellowley* (C. C. A. 7th, 1941) 123 F. (2d) 637.

§ 103. Federal Communications Commission.

The supervisory power of the Federal Communications Commission is not limited to rates and services, but covers "charges, practices, classifications, and regulations for and in connection with such communication service." 47 USC 20(b). *Ambassador, Inc. v. United States* (1945) 325 U. S. 317, 89 L. Ed. 1637, 65 S. Ct. 1151.

p. 107, n. 82. With respect to the history and powers of the Federal Communications Commission, see *Scripps-Howard Radio, Inc. v. Federal Communications Commission* (1942) 316 U. S. 4, 86 L. Ed. 1229, 62 S. Ct. 875.

§ 104A. (New) Federal Petroleum Board.

The Federal Petroleum Board, organized and named by the Secretary of the Interior pursuant to Executive Order No. 7756, 15 USC 715j, note, is the successor to the Federal Tender Board No. 1. See § 108. It is concerned with enforcement of the Connally "Hot Oil" Act. It is authorized to issue subpoenas in connection with violations of the Act, and subpoenas so issued will be enforced by Federal District Courts. 15 USC 715 et seq. *Genecov v. Federal Petroleum Board* (C. C. A. 5th, 1944) 146 F. (2d) 596, cert. den. 324 U. S. 865, 89 L. Ed. 1420, 65 S. Ct. 1578.

§ 105. Federal Power Commission.

p. 108, n. 89. The purpose of the Natural Gas Act was to provide through the exercise of the national power over interstate commerce an agency for regulating the wholesale distribution to public service companies of natural gas moving in interstate commerce not subject to certain types of state regulation, and the act was not intended to take any authority from state commissions or to usurp state regulatory authority. *Federal Power Commission v. Hope Natural Gas Co.* (1944) 320 U. S. 591, 88 L. Ed. 333, 64 S. Ct. 281.

Under the Natural Gas Act the Commission has authority to fix rates on the sale of gas in interstate commerce for resale directly to industrial consumers, as well as to domestic and other commercial users. *Colorado Interstate Gas Co. v. Federal Power Commission* (1945) 324 U. S. 531, 89 L. Ed. 1206, 65 S. Ct. 829.

The provision of the Act making it inapplicable to the production and gathering of natural gas, when read in the context, does not preclude the Com-

mission from reflecting a company's production and gathering facilities in the rate base and determining the expenses incident thereto in fixing the reasonableness of the rates subject to its jurisdiction. *Colorado Interstate Gas Co. v. Federal Power Commission* (1945) 324 U. S. 581, 89 L. Ed. 1206, 65 S. Ct. 829.

See *Central States Electric Co. v. City of Muscatine, Iowa* (1945) 324 U. S. 138, 89 L. Ed. 801, 65 S. Ct. 565.

p. 108, n. 90. The Commission's powers likewise include power to prescribe a uniform system of accounts for electric utilities. *Northwestern Electric Co. v. Federal Power Commission* (1944) 321 U. S. 119, 88 L. Ed. 596, 64 S. Ct. 451.

The Commission's powers do not include authority, except as jurisdiction is specifically provided, over facilities used in the local distribution of electrical energy. *Connecticut Light & Power Co. v. Federal Power Commission* (1945) 324 U. S. 515, 89 L. Ed. 1150, 65 S. Ct. 749.

§ 107A. (New) Federal Security Administrator.

The Federal Security Administrator, under the Federal Food, Drug and Cosmetic Act, 21 USC 341, 371, is required to "promulgate regulations fixing and establishing for any food . . . a reasonable definition and standard of identity." In a case or controversy as to the validity of an order issuing regulations under the Act, any person adversely affected may secure its review on appeal to the Circuit Court of Appeals for the circuit of his residence or principal place of business.

As enacted the Act vested the foregoing powers in the Secretary of Agriculture. By Sections 12 and 13 of Reorganization Plan No. IV, 54 Stat. 1234, 1237, 5 USC following Section 133t, the Federal Food and Drug Administration and all functions of the Secretary of Agriculture relating thereto were transferred to the Federal Security Agency and the Federal Security Administrator. *Federal Security Administrator v. Quaker Oats Co.* (1943) 318 U. S. 218, 87 L. Ed. 724, 63 S. Ct. 589; *Land O'Lakes Creameries, Inc. v. McNutt* (C. C. A. 8th, 1943) 132 F. (2d) 653.

Under the President's Reorganization Plan No. 2 of 1946, effective May 16, 1946, the Federal Security Administrator assumed the functions of the United States Employees' Compensation Commission and the Social Security Board.

§ 108. Federal Tender Boards.

The Secretary of the Interior, in organizing and naming the Federal Petroleum Board, see Executive Order No. 7756, 15 USC 715j, note, transferred to it the personnel, unexpended balances of appropriations, records, equipment, property contracts and leases of Federal Tender Board No. 1. *Genecov v. Federal Petroleum Board* (C. C. A. 5th, 1944) 146 F. (2d) 596, cert. den. 324 U. S. 865, 89 L. Ed. 1420, 65 S. Ct. 913. See § 104A.

§ 109. Federal Trade Commission.

p. 109, n. 1. The Commission's authority, under the provisions of the Webb Pomerene Act of 1918, 15 USC 61 et seq., is to investigate and recommend, not to restrain violations of the anti-trust laws, save as they may incidentally be violations of other statutes which the Commission may enforce, and its powers are exhausted when it has referred its findings to the Attorney General. *United States Alkali Export Ass'n, Inc. v. United States* (1945) 325 U. S. 196, 89 L. Ed. 1554, 65 S. Ct. 1120.

§ 110. Interstate Commerce Commission.

The Interstate Commerce Commission is an administrative board exercising administrative power, and is not a court, and has no judicial power, although it has and exercises a quasi-judicial power. *Watson Bros. Transp. Co. v. Jaffa* (C. C. A. 8th, 1944) 143 F. (2d) 340.

The Transportation Act of 1940, 49 USC 51 et seq., was intended, together with the old law, to provide a completely integrated interstate regulatory system over motor, railroad and water carriers. *United States v. Pennsylvania R. Co.* (1945) 323 U. S. 612, 89 L. Ed. 499, 65 S. Ct. 471; *McLean Trucking Co. v. United States* (1944) 321 U. S. 67, 88 L. Ed. 544, 64 S. Ct. 370.

The regulatory power of the Commission also extends to street, suburban or interurban railways which are operated as a part of a general railroad system of transportation. 49 USC 1 (22). See *City of Yonkers v. United States* (1944) 320 U. S. 685, 88 L. Ed. 400, 64 S. Ct. 327.

The Commission also has power to grant or refuse a certificate of public convenience and necessity for operation as a common carrier over inland waterways, *United States v. Detroit & Cleveland Navigation Co.* (1945) 326 U. S. 236, 90 L. Ed. 38, 66 S. Ct. 75; or for a motor carrier operating as a subsidiary of an existing railroad. *Interstate Commerce Commission v. Parker* (1945) 326 U. S. 60, 89 L. Ed. 2051, 65 S. Ct. 1490.

p. 110, n. 9. *Alabama v. United States* (1945) 325 U. S. 535, 89 L. Ed. 1779, 65 S. Ct. 1274; *North Carolina v. United States* (1945) 325 U. S. 507, 89 L. Ed. 1760, 65 S. Ct. 1260.

p. 110, n. 10. *Interstate Commerce Commission v. Hoboken Manufacturers' R. Co.* (1943) 320 U. S. 368, 88 L. Ed. 107, 64 S. Ct. 159.

§ 111. National Bituminous Coal Commission.

p. 112, n. 32. See *Binkley Mining Co. v. Wheeler* (C. C. A. 8th, 1943) 133 F. (2d) 863, cert. den. 319 U. S. 764, 87 L. Ed. 1715, 63 S. Ct. 1326.

§ 112. National Labor Relations Board.

p. 112, n. 34. See *Republic Aviation Corp. v. National Labor Relations Board* (1945) 324 U. S. 793, 89 L. Ed. 1372, 65 S. Ct. 982 and *National Labor Relations Board v. Hudson Motor Car Co.* (C. C. A. 6th, 1943) 136 F. (2d) 385.

p. 113, n. 35. *National Labor Relations Board v. West Kentucky Coal Co.* (C. C. A. 6th, 1940) 116 F. (2d) 816.

The Board acts as a public agent. See *National Labor Relations Board v. Newark Morning Ledger Co.* (C. C. A. 3rd, 1941) 120 F. (2d) 262.

§ 113. National Mediation Board.

The National Mediation Board does not have jurisdiction of grievances of individual members of a craft represented by a railroad labor organization, such as the claim of exclusion from membership in the organization on racial grounds. *Steele v. Louisville & N. R. Co.* (1944) 323 U. S. 192, 89 L. Ed. 173, 65 S. Ct. 226.

For a comparison of the functions of the Mediation Board and the Adjustment Board (§ 114) see *Elgin, J. & E. R. Co. v. Burley* (1945) 325 U. S. 711, 89 L. Ed. 1886, 65 S. Ct. 1282.

While submission to the arbitration of the Board is voluntary and refusal to arbitrate is not a violation of any legal obligation imposed by the Railway Labor Act, under the Norris-La Guardia Act, 29 USC 108, requiring "every reasonable effort" to settle a labor dispute by nonjudicial process before an injunction may issue, such refusal has resulted in the failure of the party to perfect its legal right to the jurisdiction of the federal courts for injunctive relief. *Brotherhood of Railroad Trainmen, Enterprise Lodge, No. 27 v. Toledo, P. & W. R. Co.* (1944) 321 U. S. 50, 88 L. Ed. 534, 64 S. Ct. 413.

The certification by the National Mediation Board of collective bargaining representatives is not reviewable in any court, by the terms of the Railway Labor Act. *United Transport Service Employees of America v. National Mediation Board* (App. D. C., 1944) 141 F. (2d) 724; *National Federation of Railway Workers v. National Mediation Board* (App. D. C., 1944) 141 F. (2d) 725. See *Brotherhood of Railway & Steamship Clerks v. Virginian Ry. Co.* (C. C. A. 4th, 1942) 125 F. (2d) 853. Compare §§ 41 et seq., 187 et seq., and 424 et seq.

In an appropriate case the National Mediation Board may also interpret agreements concerning rates of pay, rules or working conditions. *Order of Railway Conductors of America v. Pitney* (1946) 326 U. S. 561, 90 L. Ed. 318, 66 S. Ct. 322.

p. 113, n. 36. The policy of the Railway Labor Act is to encourage use of the nonjudicial processes of negotiation, mediation and arbitration for the adjustment of railroad labor disputes. *Brotherhood of Railroad Trainmen, Enterprise Lodge No. 27 v. Toledo, P. & W. R. Co.* (1944) 321 U. S. 50, 88 L. Ed. 534, 64 S. Ct. 413.

p. 113, n. 37. See General Committee, *B. L. E. v. Missouri-Kansas-Texas Ry. Co.* (1943) 320 U. S. 323, 88 L. Ed. 76, 64 S. Ct. 146 and *Switchmen's Union of North America v. National Mediation Board* (1943) 320 U. S. 297, 88 L. Ed. 61, 64 S. Ct. 95.

§ 113A. (New) National War Labor Board.

The National War Labor Board was established by the War Labor Disputes Act and by Executive Order, to hold hearings and decide labor disputes which threatened to interfere with the war effort. 50 USC App. 1501 et seq.; Executive Order Jan. 12, 1942, No. 9017, 50 USC App. 1507, note. The Board is not vested with judicial functions and has no power to enforce its determinations, called "directives," against the parties to a controversy before it. The pendency of a case before it is not a bar to suit in the courts. *Oil Workers International Union, Local 463 v. Texoma Natural Gas Co.* (C. C. A. 5th, 1944) 146 F. (2d) 62, cert. den. 324 U. S. 872, 89 L. Ed. 1426, 65 S. Ct. 1017. The Board's orders are merely "advisory." *National War Labor Board v. United States Gypsum Co.* (App. D. C., 1944) 145 F. (2d) 97, cert. den. 324 U. S. 856, 89 L. Ed. 1415, 65 S. Ct. 857; *National War Labor Board v. Montgomery Ward* (App. D. C., 1944) 144 F. (2d) 528, cert. den. 323 U. S. 774, 89 L. Ed. 619, 65 S. Ct. 134.

§ 114. National Railroad Adjustment Board.

The National Railroad Adjustment Board does not consider grievances of individual members of a craft represented by a railroad labor

organization, such as exclusion from membership in the organization on racial grounds. *Steele v. Louisville & N. R. Co.* (1944) 323 U. S. 192, 89 L. Ed. 173, 65 S. Ct. 226.

For a full discussion of the nature and functions of the Adjustment Board, and its relationship to the National Mediation Board, see *Elgin, J. & E. R. Co. v. Burley* (1945) 325 U. S. 711, 89 L. Ed. 1886, 65 S. Ct. 1282.

p. 113, n. 38. For a discussion of the Board's functions, see *Elgin, J. & E. R. Co. v. Burley* (1945) 325 U. S. 711, 89 L. Ed. 1886, 65 S. Ct. 1282; *Terminal Railroad Ass'n of St. Louis v. Brotherhood of Railroad Trainmen* (1943) 318 U. S. 1, 87 L. Ed. 571, 63 S. Ct. 420 and *Washington Terminal Co. v. Boswell* (App. D. C., 1941) 124 F. (2d) 335, aff'd 319 U. S. 732, 87 L. Ed. 1694, 63 S. Ct. 1430.

p. 113, n. 39. *Virginian Ry. Co. v. System Federation No. 40* (C. C. A. 4th, 1942) 131 F. (2d) 840; *Order of Railway Telegraphers v. Railway Express Agency, Inc.* (1944) 321 U. S. 342, 88 L. Ed. 788, 64 S. Ct. 582. See *Dahlberg v. Pittsburgh & L. E. R. Co.* (C. C. A. 3rd, 1943) 138 F. (2d) 121.

§ 114A. (New) Office of Contract Settlement; Appeal Board.

The Contract Settlement Act of 1944, 41 USC 101-125, provides for the settlement of claims by war contractors under terminated war contracts. In general the Act provides for the settlement of claims by war contractors by agreement between the agency and the contractor. Where they are unable to agree the agency may make findings and the contractor may appeal to the Appeal Board of the Office of Contract Settlement, or sue in the Court of Claims or under some circumstances in any court of competent jurisdiction. Appeals to the Appeal Board and such suits are both *de novo* proceedings in which the findings of the agency are reviewable on both the facts and the law, thus providing instances of legislative or administrative, not judicial, review. See §§ 45, 847A. A similar administrative appeal may be had from the Appeal Board to the Court of Claims.

§ 116. Postmaster-General.

p. 114, n. 45. See note, "Administrative Hearings in Postal Fraud Order Proceedings" (1941) 50 Yale L. J. 1479.

p. 114, n. 47. But see *Hannegan v. Esquire, Inc.* (1946) 327 U. S. 146, 90 L. Ed. 586, 66 S. Ct. 456, and § 650.

§ 117A. (New) Price Administrator.

The Office of Price Administration (the "OPA") was established by the Emergency Price Control Act of 1942, approved January 30, 1942, Public Law 421, 56 Stat. 23, 50 USC App. 901. The Office is under the direction of a Price Administrator, and has for its purpose, in the interests of national defense, the fixing of prices of commodities and rents and regulation of speculative practices. Specific authority is conferred by the Act upon the Administrator to investigate and issue subpoenas, and a procedure is outlined for the filing of protests against action of the Administrator already taken by order, regulation or price schedule. Judicial review on questions of law, including whether action taken is "arbitrary or capricious," is obtainable in an Emergency Court of Appeals specially created by Section 204 (c)

of the Act. This Court consists of three or more judges designated by the Chief Justice of the United States, and has the powers of a District Court of the United States. Specific authority is also given the Administrator to enforce the Act by injunction and criminal penalties, and he may also enforce the Act by requiring licenses of persons subject to the Act "whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act and to assure compliance with and provide for the effective enforcement of" any regulation order or price schedule issued by the Administrator. Such licenses may also be suspended.

The constitutionality of the Act was upheld in *Yakus v. United States* (1944) 321 U. S. 414, 88 L. Ed. 834, 64 S. Ct. 660.

With respect to the history of the power to ration materials under the Act, see *Henderson v. Bryan* (D. C. Cal., 1942) 46 F. Supp. 682.

§ 121. Secretary of Agriculture.

The following functions were transferred to the Secretary of Agriculture by Reorganization Plan No. 3 of 1946, effective May 16, 1946, 5 USC 133y-16, note: All functions of the Agricultural Adjustment Administration and the Surplus Marketing Administration, and the administration of the programs of the Federal Crop Insurance Corporation, and the Commodity Credit Corporation.

p. 116, n. 67. Administration of the Federal Food, Drug and Cosmetic Act is now vested in the Federal Security Administrator. See § 107A.

§ 123. Secretary of the Interior.

p. 117, n. 82. See *Gray v. Powell* (1941) 314 U. S. 402, 86 L. Ed. 301, 62 S. Ct. 326.

§ 127. Securities and Exchange Commission.

Under the bankruptcy laws, the Commission has advisory functions and the duty of acting to protect the public interest in reorganization proceedings. *Securities & Exchange Commission v. United States Realty & Improvement Co.* (1940) 310 U. S. 434, 84 L. Ed. 1293, 60 S. Ct. 1044.

§ 128. Selective Service System Boards.

With respect to methods of judicial review of action of Selective Service System Boards, see *Estep v. United States* (1946) 327 U. S. 114, 90 L. Ed. 567, 66 S. Ct. 423; *Ex Parte Stanziale* (C. C. A. 3rd, 1943) 138 F. (2d) 312, cert. den. 320 U. S. 797, 88 L. Ed. 481, 64 S. Ct. 267.

Selective Service System Boards are administrative agencies. *United States ex rel. Broker v. Baird* (D. C. E. D. N. Y., 1941) 39 F. Supp. 392. See also § 708.

§ 129. Social Security Board: Federal Security Agency.

The Social Security Board was abolished on May 16, 1946.

"SEC. 4. SOCIAL SECURITY BOARD.—The functions of the Social Security Board in the Federal Security Agency, together with the

functions of its chairman, are transferred to the Federal Security Administrator and shall be performed by him or under his discretion and control by such officers and employees of the Federal Security Agency as he shall designate. The Social Security Board is abolished." (Reorganization Plan No. 2 of 1946, effective May 16, 1946, 5 USC 133y-16, note.)

The functions of the United States Employees Compensation Commission have also been transferred to the Federal Security Agency. See §§ 107A, 131.

§ 129A. (New) The Tax Court of the United States.

"The Tax Court of the United States" was formerly known as the Board of Tax Appeals. See § 94. However, it is not a court in which the "judicial power" of the United States is vested under Article III of the Constitution, but is a legislative court or administrative tribunal. See § 47.

The Tax Court is not a policy-making body; it is an administrative tribunal with quasi-judicial functions. *West v. Commissioner of Internal Revenue* (C. C. A. 5th, 1945) 150 F. (2d) 723, cert. den. 327 U. S. 815, 328 U. S. 877, 881, 90 L. Ed. 1646, 66 S. Ct. 488, 489, 679, 680.

Congress has invested the Tax Court, as an administrative tribunal, with primary authority for redetermining tax deficiencies, which constitutes the greater part of tax litigation. *Dobson v. Commissioner of Internal Revenue* (1943) 320 U. S. 489, 88 L. Ed. 248, 64 S. Ct. 239.

§ 129B. (New) United States Civil Service Commission.

Under the Hatch Political Activity Act, 18 USC 61-62, the United States Civil Service Commission is authorized to determine whether any officer or employee of a state or local agency whose principal employment is in connection with any activity which is financed in whole or in part by loans or grants made by the United States or by any Federal Agency, has indulged in a political activity prohibited by the Act. If the Commission so finds, it may also determine that the violation warrants the removal of the officer or employee from office, and shall so notify the officer or employee and the state or local agency. If the officer or employee is not removed after such notice, the Commission shall make an order requiring the appropriate Federal Agency to withhold from its loans or grants to the state or local agency an amount equal to two years' compensation of the officer or employee. 18 USC 61l (b). The determination or order of the Commission is judicially reviewable in a Federal District Court. 18 USC 61l (c). See § 856A.

§ 131. United States Employees' Compensation Commission: Deputy Commissioners.

The United States Employees' Compensation Commission was abolished and its functions transferred to the Federal Security Agency on May 16, 1946. See § 107A.

“SEC. 3. UNITED STATES EMPLOYEES’ COMPENSATION COMMISSION. —The functions of the United States Employees Compensation Commission are transferred to the Federal Security Agency and shall be performed in such manner and under such rules and regulations as the Federal Security Administrator shall prescribe. Such regulations shall provide for a board of three persons to be designated or appointed by the Federal Security Administrator with authority to hear and, subject to applicable law, make final decision on appeals taken from determinations and awards with respect to claims of employees of the Federal Government or the District of Columbia. The United States Employees Compensation Commission is abolished.” (Reorganization Plan No. 2 of 1946, effective May 16, 1946, 5 USC 133y-16, note.)

§ 132. United States Maritime Commission.

p. 121, n. 14. Storage facilities, whether owned privately or by public organizations, are likewise subject to the regulation of the Commission. *State of California v. United States* (1944) 320 U. S. 577, 83 L. Ed. 322, 64 S. Ct. 352.

§ 132A. (New) United States Processing Tax Board of Review.

The United States Processing Tax Board of Review reviews and determines claims for refund of taxes paid under the Agricultural Adjustment Acts, which were held unconstitutional in *United States v. Butler*, 297 U. S. 1, 80 L. Ed. 477, 56 S. Ct. 312. It has no jurisdiction over custom processing tax refund claims, that is, over claims of taxpayers who paid taxes on the processing of commodities for customers for a charge or fee. *Fuhrman & Foster Co. v. Commissioner of Internal Revenue* (C. C. A. 7th, 1940) 114 F. (2d) 863, cert. den. 312 U. S. 686, 85 L. Ed. 1123, 61 S. Ct. 613.

§ 135A. (New) War Contracts Price Adjustment Board.

The Renegotiation Act passed in 1942, 50 USC 1191, provides for the determination of excessive profits derived from contracts with certain departments of the Government, by agreement between the contractor and the Board, or if agreement is impossible, by order of the Board. Such an order of the Board is reviewable *de novo*, that is, both on the facts and on the law, by the Tax Court, and provides an illustration of legislative or administrative, not judicial, review. See §§ 45, 861.

VI. STATE AGENCIES

§ 137. Federal Requirements.

p. 125, n. 53. *Terminal Railroad Ass’n of St. Louis v. Brotherhood of Railroad Trainmen* (1943) 318 U. S. 1, 87 L. Ed. 571, 63 S. Ct. 420.

Where an order of the Interstate Commerce Commission is ambiguous, the authority of a state over intrastate rates cannot rightly be deemed to be supplanted so long as the Commission’s exercise of its authority is left in serious doubt. *Illinois Commerce Commission v. Thomson* (1943) 318 U. S. 675, 87 L. Ed. 1075, 63 S. Ct. 834. See § 574.

CHAPTER 5

RELATION OF ADMINISTRATIVE AGENCIES TO THE EXECUTIVE

§ 141. In General.

p. 128, n. 3. The Tennessee Valley Authority exercises predominantly an executive or administrative function, to be distinguished from other administrative agencies exercising clearly quasi-judicial or quasi-legislative functions, and the President has power to remove its officers for causes other than those specified in the Act. *Morgan v. Tennessee Valley Authority* (C. C. A. 6th, 1940) 115 F. (2d) 990, cert. den. 312 U. S. 701, 85 L. Ed. 1135, 61 S. Ct. 806.

Clear statutory language is required to curtail the President's power to remove executive officers for causes other than those specified. *Morgan v. Tennessee Valley Authority* (C. C. A. 6th, 1940) 115 F. (2d) 990, cert. den. 312 U. S. 701, 85 L. Ed. 1135, 61 S. Ct. 806.

See note, "President's Power of Removal" (1938) 51 Harv. L. Rev. 1246.
p. 129, n. 8. See *Morgan v. Tennessee Valley Authority* (C. C. A. 6th, 1940) 115 F. (2d) 990, cert. den. 312 U. S. 701, 85 L. Ed. 1135, 61 S. Ct. 806.

CHAPTER 6

RELATION OF ADMINISTRATIVE AGENCIES TO THE JUDICIARY

§ 143. Administrative Agencies Compared to Fact-Finding Agencies in Judicial Proceedings.

p. 132, n. 5. *Federal Petroleum Board*. *Genecov v. Federal Petroleum Board* (C. C. A. 5th, 1944) 146 F. (2d) 596, cert. den. 324 U. S. 865, 89 L. Ed. 1420, 65 S. Ct. 913.

Interstate Commerce Commission. *Reconstruction Finance Corp. v. Bankers Trust Co.* (1943) 318 U. S. 163, 87 L. Ed. 680, 63 S. Ct. 515.

National Labor Relations Board. *West Virginia Glass Specialty Co. v. National Labor Relations Board* (C. C. A. 4th, 1943) 134 F. (2d) 551, cert. den. 320 U. S. 738, 88 L. Ed. 437, 64 S. Ct. 38; *National Labor Relations Board v. Alco Feed Mills* (C. C. A. 5th, 1943) 133 F. (2d) 419; *Stonewall Cotton Mills v. National Labor Relations Board* (C. C. A. 5th, 1942) 129 F. (2d) 629, cert. den. 317 U. S. 667, 87 L. Ed. 536, 63 S. Ct. 72. See *Hazel-Atlas Glass Co. v. National Labor Relations Board* (C. C. A. 4th, 1942) 127 F. (2d) 109.

Securities and Exchange Commission. *Securities & Exchange Commission v. Chenery Corp.* (1943) 318 U. S. 80, 87 L. Ed. 626, 63 S. Ct. 454.

Law Review Article. See R. L. Stern, "Review of Findings of Administrators, Judges, and Juries: A Comparative Analysis" (1944) 58 Harv. L. Rev. 70.

p. 132, n. 6. See *Switchmen's Union v. National Mediation Board* (1943) 320 U. S. 297, 88 L. Ed. 61, 64 S. Ct. 95.

p. 133, n. 12. *Espino v. Wixon* (C. C. A. 9th, 1943) 136 F. (2d) 96.

§ 144. Courts and Agencies Are Interdependent and Coordinate.

Courts no less than administrative bodies are agencies of the Government. Both are instruments for realizing public purposes.

Scripps-Howard Radio v. Federal Communications Commission (1942) 316 U. S. 4, 86 L. Ed. 1229, 62 S. Ct. 875.

The petition of an administrative agency for an injunction against the violation of its orders, as an application for the exercise of judicial discretion, is the other side of the duty upon courts to accord to the determinations of agencies the finality which Congress intended, in the pursuance of the mutual obligation of the courts and agencies to work as coordinate instrumentalities of justice to attain the statutory ends. *Hecht Co. v. Bowles* (1944) 321 U. S. 321, 88 L. Ed. 754, 64 S. Ct. 587.

p. 133, n. 15. *Hecht Co. v. Bowles* (1944) 321 U. S. 321, 88 L. Ed. 754, 64 S. Ct. 587.

p. 134, n. 16. *Addison v. Holly Hill Fruit Products* (1944) 322 U. S. 607, 88 L. Ed. 1488, 64 S. Ct. 1215; *Hecht v. Bowles* (1944) 321 U. S. 321, 88 L. Ed. 754, 64 S. Ct. 587; *United States v. Morgan* (1941) 313 U. S. 409, 85 L. Ed. 1429, 61 S. Ct. 999.

§ 145. Agency Not Comparable to Lower Court.

p. 135, n. 23. See *Chenery Corp. v. Securities & Exchange Commission* (1946) 154 F. (2d) 6.

§ 146. Some Differences Between Courts and Agencies.

p. 136, n. 25. See *Phelps Dodge Corp. v. National Labor Relations Board* (1941) 313 U. S. 177, 85 L. Ed. 1271, 61 S. Ct. 845, 133 A. L. R. 1217.

CHAPTER 7

ADMINISTRATIVE ACTION INVOLVING MORE THAN ONE AGENCY

§ 147. Coordinate Action by Different Agencies.

The mere filing of proceedings, or the pendency of proceedings, before a state agency is not necessarily a ground for a stay of proceedings in a federal agency. Thus the jurisdiction of the National Labor Relations Board is not ousted or interfered with by the prior filing of proceedings before a state board, and the pendency thereof. *National Labor Relations Board v. Eclipse Moulded Products Co.* (C. C. A. 7th, 1942) 126 F. (2d) 576.

The Emergency Price Control Act of 1942, 50 USC App. 901 et seq., and the Inflation Control Act, 50 USC App. 961 et seq., are ordinarily the concern of the Price Administrator, but where these Acts are involved, the Interstate Commerce Commission may decide whether there has been a material violation in a proceeding before it. *Interstate Commerce Commission v. Jersey City* (1944) 322 U. S. 503, 88 L. Ed. 1420, 64 S. Ct. 1129.

p. 138, n. 1. *Interstate Commerce Commission v. Jersey City* (1944) 322 U. S. 503, 88 L. Ed. 1420, 64 S. Ct. 1129.

p. 138, n. 3. See *First Iowa Hydro-Electric Cooperative v. Federal Power Commission* (1946) 328 U. S. 152, 90 L. Ed. 1143, 66 S. Ct. 906.

§ 148. Transfer of Administrative Functions to a Different Agency.

By Section 2 (a) (8) III of the Second War Powers Act, the President was granted authority to allocate material and facilities as he should deem necessary or appropriate in the public interest or national defense through such department, agency or officer of the government as he might direct and in conformity with any rules or regulations which he might prescribe. The delegation by the President to the Office of Price Administration was not questioned. *L. P. Stewart & Bro. v. Bowles* (1944) 322 U. S. 398, 88 L. Ed. 1350, 64 S. Ct. 1097.

See § 10A with respect to the subdelegation of legislative power.

p. 139, n. 7. Congress is free to apportion the functions of the Interstate Commerce Commission and the federal stabilization agencies as it sees fit and to transfer any part of the normal responsibility of the Commission to the Price Administrator or other executive agencies. *Interstate Commerce Commission v. Jersey City* (1944) 322 U. S. 503, 88 L. Ed. 1420, 64 S. Ct. 1129. See *L. P. Stewart & Bro. v. Bowles* (1944) 322 U. S. 398, 88 L. Ed. 1350, 64 S. Ct. 1097.

p. 139, n. 8. *California Lima Bean Growers Ass'n v. Bowles* (Em. App., 1945) 150 F. (2d) 964.

§ 148A. (New) Where One Agency Participates as Litigant in Administrative Proceedings Conducted by Another Agency.

The intervention of the Director of Economic Stabilization and the Price Administrator in a rate proceeding before the Public Utilities Commission of the District of Columbia is in subordination to the Commission's primary jurisdiction of the subject matter and neither changes nor enlarges the issue before it. *Vinson v. Washington Gas Light Co.* (1944) 321 U. S. 489, 88 L. Ed. 883, 64 S. Ct. 731.

In the absence of clear legislation to the contrary, the rights of an administrative agency intervening in a proceeding conducted by another administrative agency are no greater than those of other intervenors. *Interstate Commerce Commission v. Jersey City* (1944) 322 U. S. 503, 88 L. Ed. 1420, 64 S. Ct. 1129; *Vinson v. Washington Gas Light Co.* (1944) 321 U. S. 489, 88 L. Ed. 883, 64 S. Ct. 731.

The contentions of an administrative agency intervening in a proceeding before another agency are entitled to neither more nor less weight than that accorded a private litigant. See § 516.

Whether an agency conducting administrative proceedings accedes to the request of an intervening agency for the taking of certain additional evidence is a question to be determined in the discretion of the agency in charge of the proceedings. *McLean Trucking Co. v. United States* (1944) 321 U. S. 67, 88 L. Ed. 544, 64 S. Ct. 370.

Administrative Procedure Act. The Administrative Procedure Act, Sec. 12, provides that: "Except as otherwise required by law, all requirements or privileges relating to evidence or procedure shall apply equally to agencies and persons."

BOOK II

ADMINISTRATIVE PROCEEDINGS

CHAPTER 8

ASPECTS OF ADMINISTRATIVE PROCEEDINGS

§ 149. Introduction.

The proper composition of an administrative agency, or of a joint board which acts as examiner, is a judicial question. See § 435.

Administrative Procedure Act. "(g) AGENCY PROCEEDING AND ACTION.—'Agency proceeding' means any agency process as defined in subsections (c), (d), and (e) of this section. 'Agency action' includes the whole or part of every agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." (Administrative Procedure Act, Sec. 2(g).)

§ 150. Adversary Administrative Proceedings Comparable to Judicial Proceedings; Implied Judicial Powers.

However, the substantive or nonprocedural powers of courts are not conferred upon administrative agencies by implication because they conduct adversary proceedings. Agencies are not vested with judicial power under Article III of the Constitution, see § 41, and receive no implied powers from the general principles of equity. Thus the Tax Court receives its power from the Internal Revenue Code, and receives no implied powers from the general principles of equity. *Commissioner of Internal Revenue v. Gooch Milling & Elevator Co.* (1943) 320 U. S. 418, 88 L. Ed. 139, 64 S. Ct. 184.

p. 142, n. 5. See *National Labor Relations Board v. Franks Bros. Co.* (C. C. A. 1st, 1943) 137 F. (2d) 989, aff'd 321 U. S. 702, 88 L. Ed. 1020, 64 S. Ct. 817.

When a new law is enacted during the pendency of administrative proceedings, the administrative body must apply the new law, as a court does when a new law is enacted pending an appeal; and the parties must have a chance to show compliance with the amended section. *Ziffren v. United States* (1943) 318 U. S. 73, 87 L. Ed. 621, 63 S. Ct. 465.

However, the differences in origin and function between administrative agencies and courts preclude wholesale transportation of the rules of procedure, trial and review which have evolved from the history and experience of courts. Accordingly, the principle of estoppel otherwise applicable cannot be applied to limit the power of an agency in its administrative proceedings where to do so would frustrate the purposes of the Act under which it operates. *Wallace Corp. v. National Labor Relations Board* (1945) 323 U. S. 248, 89 L. Ed. 216, 65 S. Ct. 238. See also § 252A.

With respect to the scope of the discretion of administrative agencies in determining their procedure, see § 150A.

§ 150A. (New) — Discretion of Agency as to Procedure Appropriate for Exercise of Administrative Powers.

In general, administrative agencies have discretion as to the procedure to be adopted or followed in the exercise of their powers, so long as constitutional and statutory requirements are met. See §§ 174 and 274 et seq.

Civil Aeronautics Board. *W. R. Grace & Co. v. Civil Aeronautics Board* (C. C. A. 2d, 1946) 154 F. (2d) 271.

Federal Trade Commission. *Segal Lock & Hardware Co. v. Federal Trade Commission* (C. C. A. 2d, 1944) 143 F. (2d) 935, cert. den. 323 U. S. 791, 89 L. Ed. 631, 65 S. Ct. 429.

Interstate Commerce Commission. *Interstate Commerce Commission v. Jersey City* (1944) 322 U. S. 503, 88 L. Ed. 1420, 64 S. Ct. 1129; *Peninsula Corp. v. United States* (D. C. D. Col., 1945) 60 F. Supp. 174; *McCracken v. United States* (D. C. D. Ore., 1942) 47 F. Supp. 444; *A. E. McDonald Motor Freight Lines v. United States* (C. C. N. C. Tex., 1940) 35 F. Supp. 132. See *Arenas v. United States* (1944) 322 U. S. 419, 88 L. Ed. 1363, 64 S. Ct. 1090.

National Labor Relations Board. *National Labor Relations Board v. Federal Engineering Co.* (C. C. A. 6th, 1946) 153 F. (2d) 233. See *National Labor Relations Board v. Algoma Plywood & Veneer Co.* (C. C. A. 7th, 1941) 121 F. (2d) 602.

It is the function of an examiner, just as it is the recognized function of a trial judge, to see that facts are clearly and fully developed. *National Labor Relations Board v. Franks Bros. Co.* (C. C. A. 1st, 1943) 137 F. (2d) 989, aff'd 321 U. S. 702, 88 L. Ed. 1020, 64 S. Ct. 817.

Secretary of Agriculture. *Midwest Farmers, Inc. v. United States* (D. C. D. Minn., 1945) 64 F. Supp. 91.

United States Civil Service Commission. *State of Ohio v. United States Civil Service Commission* (D. C. S. D. Ohio, 1946) 65 F. Supp. 776.

Quotation. "The Commission, by the very nature of its duties, has the inherent power to fix the time of hearings, grant or refuse continuances, make its own rules of procedure, and to adopt and follow such methods of investigation and inquiry as will enable it best to discharge its responsibilities and the duties imposed on it." (*Judge McGuire in Peninsula Corp. v. United States* (D. C. D. C., 1945) 60 F. Supp. 174.)

Thus an administrative agency is vested with lawful discretion to determine whether a proceeding, when once instituted, may be abandoned. *National Labor Relations Board v. Federal Engineering Co.* (C. C. A. 6th, 1946) 153 F. (2d) 233; to decide in what order to take up the issues of litigation before it, *V. R. Grace & Co. v. Civil Aeronautics Board* (C. C. A. 2d, 1946) 154 F. (2d) 271; and to complete the rate-making process in two steps instead of one, and it may take the second step without retracing all previous ones. See *Interstate Commerce Commission v. Jersey City* (1944) 322 U. S. 503, 88 L. Ed. 1420, 64 S. Ct. 1129.

An administrative agency has the same discretion as that of a trial judge with respect to the admissibility of evidence. See § 303A.

The broad discretion of administrative agencies with respect to their procedure is confirmed in the Administrative Procedure Act, Sec. 7(b), which provides as follows: "(b) HEARING POWERS.— Officers presiding at hearings shall have authority, subject to the published rules of the agency and within its powers, to (1) administer oaths and affirmations, (2) issue subpoenas authorized by law, (3) rule upon offers of proof and receive relevant evidence, (4) take or cause depositions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of the hearing, (6) hold conferences for the settlement or simplification of the issues by consent of the parties, (7) dispose of procedural requests or similar matters, (8) make decisions or recommend decisions in conformity with section 8, and (9) take any other action authorized by agency rule consistent with this Act."

Sec. 12 provides: "Every agency is granted all authority necessary to comply with the requirements of this Act through the issuance of rules or otherwise."

§ 151A. (New) Legal Effect of Failure to Institute Proceedings or Exercise Jurisdiction.

An administrative agency is not ordinarily under an obligation to test the limits of its jurisdiction immediately. However, failure to exercise power may be significant as a factor shedding light on whether it has been conferred. *United States v. American Union Transport, Inc.* (1946) 327 U. S. 437, 90 L. Ed. 772, 66 S. Ct. 644, especially *Frankfurter, J.*, dissenting.

An administrative agency is not barred from issuing a prospective order or regulation by any doctrine of estoppel by prior disclaimer, disuse, or failure to take action.

Interstate Commerce Commission. See *City of Danville v. Chesapeake & O. R. Co.* (D. C. W. D. Va., 1940) 34 F. Supp. 620.

National Labor Relations Board. *National Labor Relations Board v. Baltimore Transit Co.* (C. C. A. 4th, 1944) 140 F. (2d) 51, cert. den. 321 U. S. 795, 88 L. Ed. 1084, 64 S. Ct. 848.

Price Administrator. *Bowles v. Harrison* (D. D. W. D. Pa., 1945) 61 F. Supp. 160.

Secretary of Agriculture. See *Queensboro Farms Products Co. v. Wickard* (C. C. A. 2d, 1943) 137 F. (2d) 969.

Securities and Exchange Commission. *Shawmut Ass'n v. Securities & Exchange Commission* (C. C. A. 1st, 1945) 146 F. (2d) 791.

As a general rule laches or neglect of duty on the part of officers of the government is no defense to a suit by it to enforce a public right or protect a public interest. *Utah Power & Light Co. v. United States* (1917) 243 U. S. 389, 61 L. Ed. 791, 37 S. Ct. 387. See *National Labor Relations Board v. J. G. Boswell Co.* (C. C. A. 9th, 1943) 136 F. (2d) 585 and § 252A.

§ 151B. (New) Ineffectiveness of State Statutes of Limitations.

Where there is no federal statute of limitations applicable to claims which an administrative agency may consider, a state statute

of limitations may not apply to cut off the right of the agency to consider the claim, or to absolve the courts from a statutory duty to enforce the agency's award. *Order of Railway Telegraphers v. Railway Express Agency, Inc.* (1944) 321 U. S. 342, 88 L. Ed. 788, 64 S. Ct. 582.

§ 152. Importance of Success in Administrative Proceedings.

With respect to the desirability of judicial review in general, see *National Labor Relations Board v. Ford Motor Co.* (C. C. A. 5th, 1941) 119 F. (2d) 326.

§ 155. Initiation of Proceedings by Agencies.

Whether proceedings should be instituted ordinarily rests in the sound discretion of the agency, so that an agency's issuance of a moving complaint is not controllable by mandamus. *Jacobsen v. National Labor Relations Board* (C. C. A. 3rd, 1941) 120 F. (2d) 96.

See also § 688 et seq.

§ 155A. (New) Federal Agency May Assume Constitutionality of State Regulatory Statute.

A federal administrative agency may assume the constitutionality of state regulatory statutes, under both State and Federal Constitutions, in the absence of a contrary judicial determination. State statutes, like federal ones, are entitled to the presumption of constitutionality until their invalidity is judicially declared. Certainly no power to adjudicate constitutional issues is conferred on the agency. *Davies Warehouse Co. v. Bowles* (1944) 321 U. S. 144, 88 L. Ed. 635, 64 S. Ct. 474. See § 239.

§ 155B. (New) New Legislation Immediately Applicable to Administrative Proceedings.

A change of law pending an administrative hearing must be followed in relation to permits for future acts. *Ziffrin v. United States* (1943) 318 U. S. 73, 87 L. Ed. 621, 63 S. Ct. 465.

§ 155C. (New) Requirements for Obtaining Jurisdiction Over Parties.

An administrative agency must have jurisdiction over the parties sought to be affected by its order, as in any *in personam* action. *California Lumbermen's Council v. Federal Trade Commission* (C. C. A. 9th, 1940) 115 F. (2d) 178, cert. den. 312 U. S. 709, 85 L. Ed. 1141, 61 S. Ct. 827.

Service on a party of a copy of the complaint and notice of the hearing subjects the party to the jurisdiction of the administrative agency even though the party fails to appear. *National Labor Relations Board v. J. G. Boswell Co.* (C. C. A. 9th, 1943) 136 F. (2d) 585.

Jurisdiction over the parties to an administrative proceeding may be based on the appearance of an attorney who represents that he is

appearing for all respondents. *California Lumbermen's Council v. Federal Trade Commission* (C. C. A. 9th, 1940) 115 F. (2d) 178, cert. den. 312 U. S. 709, 85 L. Ed. 1141, 61 S. Ct. 827.

An irregularity in the service of notice by the agency is waived by the party's voluntary and timely appearance. *Commissioner of Internal Revenue v. Rosenheim* (C. C. A. 3rd, 1942) 132 F. (2d) 677.

CHAPTER 9

PLEADINGS

§ 156. Form Should Resemble Pleadings in Judicial Proceedings.

Where a party considers the complaint in an administrative proceeding insufficiently specific, he should demand a bill of particulars. *National Labor Relations Board v. Yale & Towne Mfg. Co.* (C. C. A. 2d, 1940) 114 F. (2d) 376.

A complaint in an administrative proceeding should state facts which will enable the respondent to understand the offense which it is alleged he has committed and to understand the issue he will be required to meet. *National Labor Relations Board v. Sunbeam Electric Mfg. Co.* (C. C. A. 7th, 1943) 133 F. (2d) 856.

A Regional Director of the National Labor Relations Board may sign and issue complaints for the Board. *National Labor Relations Board v. Sunbeam Electric Mfg. Co.* (C. C. A. 7th, 1943) 133 F. (2d) 856.

p. 148, n. 11. *National Labor Relations Board v. Sunbeam Electric Mfg. Co.* (C. C. A. 7th, 1943) 133 F. (2d) 856; *National Labor Relations Board v. Precision Castings Co.* (C. C. A. 6th, 1942) 130 F. (2d) 639.

§ 157A. (New) Admissions in Pleadings.

Admissions in the pleadings upon which the hearing was held have the same character as admissions in judicial proceedings, and are binding on the parties unless withdrawn or amended. *Scott v. Commissioner of Internal Revenue* (C. C. A. 8th, 1941) 117 F. (2d) 36.

CHAPTER 10

PARTIES

§ 158. In General.

Refusal by an agency to allow a person to participate in an administrative proceeding is not judicially reviewable, in the absence of constitutional or statutory requirements. *Okin v. Securities & Exchange Commission* (C. C. A. 2d, 1944) 143 F. (2d) 960.

Administrative Procedure Act. “(b) PERSON AND PARTY.— ‘Person’ includes individuals, partnerships, corporations, associations, or public or private organizations of any character other than agencies. ‘Party’ includes any person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any agency proceeding; but nothing herein shall be construed to prevent an agency from admitting any person or agency as a party for limited purposes.” (Administrative Procedure Act, Sec. 2(b).)

§ 159. Parties Complainant.

Proper authorization at least must be obtained before one person may represent another as a party to an administrative proceeding. *Elgin, J. & E. Ry. Co. v. Burley* (1946) 327 U. S. 661, 90 L. Ed. 928, 66 S. Ct. 721.

§ 160. Defending Parties.

Where a complaint was dismissed as against a corporation because of its dissolution, an administrative agency is justified in entering an order against former officers named in the complaint, who had dominant control of the dissolved and of a succeeding corporation. *Gelb v. Federal Trade Commission* (C. C. A. 2d, 1944) 144 F. (2d) 580. See § 785.

An objection to nonjoinder of parties defendant is considered waived unless timely raised. *Wolf v. Federal Trade Commission* (C. C. A. 7th, 1943) 135 F. (2d) 564.

Nonjoinder of parties not indispensable does not affect jurisdiction. *Wolf v. Federal Trade Commission* (C. C. A. 7th, 1943) 135 F. (2d) 564.

§ 161. Intervening Parties.

Where there is a right to intervene it is not satisfied by permission of the agency, to the party seeking to intervene, to file a brief *amicus curiae* and to present oral argument. *Federal Communications Commission v. National Broadcasting Co., Inc.* (1943) 319 U. S. 239, 87 L. Ed. 1374, 63 S. Ct. 1035.

p. 150, n. 10. But see *Solvay Process Co. v. National Labor Relations Board* (C. C. A. 5th, 1941) 117 F. (2d) 83, cert. den. 313 U. S. 596, 85 L. Ed. 1549, 61 S. Ct. 1121.

p. 150, n. 11. *Federal Communications Commission v. National Broadcasting Co., Inc.* (1943) 319 U. S. 239, 87 L. Ed. 1374, 63 S. Ct. 1035; *Mississippi Valley Barge Line Co. v. United States* (D. C. W. D. Pa., 1944) 56 F. Supp. 1.

p. 150, n. 12. *Okin v. Securities & Exchange Commission* (C. C. A. 2d, 1944) 143 F. (2d) 960. See *National Labor Relations Board v. Reed & Prince Mfg. Co.* (C. C. A. 1st, 1941) 118 F. (2d) 874, cert. den. 313 U. S. 595, 85 L. Ed. 1549, 61 S. Ct. 1119.

p. 151, n. 14. *Mississippi Valley Barge Line Co. v. United States* (D. C. W. D. Pa., 1944) 56 F. Supp. 1.

p. 151, n. 16. *Solvay Process Co. v. National Labor Relations Board* (C. C. A. 5th, 1941) 117 F. (2d) 83, cert. den. 313 U. S. 596, 85 L. Ed. 1549, 61 S. Ct. 1121; *National Labor Relations Board v. Ed. Friedrich, Inc.* (C. C. A. 5th, 1940) 116 F. (2d) 888.

CHAPTER 11

HEARING

§ 163. Introduction.

What constitutes a quorum of an administrative agency is a judicial question. See § 435.

Administrative Procedure Act. With respect to the powers of officers presiding at hearings, see § 150A herein and the Administrative Procedure Act, Sec. 7(b).

§ 163A. (New) Consolidation.

Whether certain applications or administrative proceedings should be consolidated for hearing is ordinarily a matter within the discretion of the agency.

Federal Power Commission. *Colorado-Wyoming Gas Co. v. Federal Power Commission* (1945) 324 U. S. 625, 89 L. Ed. 1235, 65 S. Ct. 829.

Where three natural gas companies operate as a single project to the extent that an alteration in the rates of one would affect the reasonableness of the rates of the other two, the Commission may consolidate investigations and hearings on the interstate wholesale rates charged by each. *Colorado-Wyoming Gas Co. v. Federal Power Commission* (1945) 324 U. S. 625, 89 L. Ed. 1235, 65 S. Ct. 829. However, when it came to an allocation of costs among one of the companies' classes of business, the Commission was required to consider the costs of that company as a separate and individual question. *Colorado-Wyoming Gas Co. v. Federal Power Commission* (1945) 324 U. S. 625, 89 L. Ed. 1235, 65 S. Ct. 829.

Interstate Commerce Commission. *American Trucking Ass'ns, Inc. v. United States* (1945) 326 U. S. 77, 89 L. Ed. 2065, 65 S. Ct. 1499.

National Labor Relations Board. *Standard Oil Co. v. National Labor Relations Board* (C. C. A. 8th, 1940) 114 F. (2d) 743. See *Inland Empire District Council, L. S. W. U. v. Millis* (1945) 325 U. S. 697, 89 L. Ed. 1877, 65 S. Ct. 1316 and *National Labor Relations Board v. American Laundry Co.* (C. C. A. 2d, 1945) 152 F. (2d) 400.

Tax Court. *Scott v. Commissioner of Internal Revenue* (C. C. A. 8th, 1941) 117 F. (2d) 36.

A federal administrative agency may hold a joint hearing with an interested state agency. See *United States v. New York Telephone Co.* (1946) 326 U. S. 638, 90 L. Ed. 371, 66 S. Ct. 393.

§ 163B. (New) Continuances.

The granting or denial of continuances is within the wide discretion of the trial examiner. *National Labor Relations Board v. Algonoma Plywood & Veneer Co.* (C. C. A. 7th, 1941) 121 F. (2d) 602. See § 150A.

I. MOTIONS

§ 164. In General.

The filing with an agency of an application for a permit, followed by a motion to dismiss the application on the ground that it is not required under the Act, is a proper method of raising the issue whether the applicant is subject to the permit requirement. *Schenley Distillers Corp. v. United States* (1946) 326 U. S. 432, 90 L. Ed. 181, 66 S. Ct. 247.

p. 153, n. 7. With respect to motions for consolidation, see § 163A.

II. EVIDENCE

§ 165. Introduction.

Administrative Procedure Act. "(c) EVIDENCE.—Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form." (Administrative Procedure Act, Sec. 7(c).)

§ 166. Rules of Evidence Not Necessarily Controlling.

The more liberal the practice in admitting testimony, however, the more imperative it is to preserve the essential rules of evidence by which rights are asserted or defended. The requirement of fair trial is binding on administrative agencies as well as on courts, and the need for safeguards such as cross-examination is greater. *Powhatan Mining Co. v. Ickes* (C. C. A. 6th, 1941) 118 F. (2d) 105. See § 274 et seq.

Courts have consistently recognized the right of administrative officers to inquire into collateral matters for the purpose of testing credibility. *Jung Sam v. Haff* (C. C. A. 9th, 1940) 116 F. (2d) 384.

Hearsay evidence may be admissible in administrative proceedings. *National Labor Relations Board v. Cities Service Oil Co.* (C. C. A. 2d, 1942) 129 F. (2d) 933; *National Labor Relations Board v. Service Wood Heel Co.* (C. C. A. 1st, 1941) 124 F. (2d) 470. But see § 586 et seq.

The admissibility of leading questions is a matter for the discretion of the trial examiner. *National Labor Relations Board v. Condenser Corp.* (C. C. A. 3rd, 1942) 128 F. (2d) 67. See § 150A.

It has been held that administrative agencies should admit all evidence which is clearly admissible and all evidence of doubtful admissibility, in order to minimize the chances of reversal by a reviewing court on the grounds of rejection of competent evidence. *Donnelly Garment Co. v. National Labor Relations Board* (C. C. A. 8th, 1941) 123 F. (2d) 215.

Under the Revenue Act proceedings in the Board of Tax Appeals are to be conducted in accordance with the rules of evidence applicable in equity courts of the District of Columbia. In such proceedings admission of a communication between attorney and client was reversible error. *Baldwin v. Commissioner of Internal Revenue* (C. C. A. 9th, 1942) 125 F. (2d) 812.

Administrative Procedure Act. Under the Administrative Procedure Act, Sec. 7(c), "every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence" See § 165 herein.

p. 154, n. 13. See § 579.

p. 154, n. 14. *Wallace Corp. v. National Labor Relations Board* (1944) 323 U. S. 248, 89 L. Ed. 216, 65 S. Ct. 238; *Hickok Oil Corp. v. Commissioner of Internal Revenue* (C. C. A. 6th, 1941) 120 F. (2d) 133.

§ 167. Practical Desirability of Making All Possible Proof in Administrative Proceedings.

p. 154, n. 15. *Wong Hong Jim v. Carmichael* (C. C. A. 9th, 1940) 115 F. (2d) 529.

p. 155, n. 22. See § 611.

§ 167A. (New) Evidence Must Be Presented at Earliest Opportunity.

Where in an earlier proceeding involving the same parties there was full opportunity to present evidence on a particular issue, such evidence must then be presented or it will not necessarily be received in a later proceeding. *Pittsburgh Plate Glass Co. v. National Labor Relations Board* (1941) 313 U. S. 146, 85 L. Ed. 1251, 61 S. Ct. 908, rehearing den. 313 U. S. 599, 85 L. Ed. 1551, 61 S. Ct. 1093. Application of this rule is fully justified where there is no attempt to show that such evidence is more than merely cumulative, or that it was unavailable or undiscovered at the time of the earlier hearing. *Pittsburgh Plate Glass Co. v. National Labor Relations Board* (1941) 313 U. S. 146, 85 L. Ed. 1251, 61 S. Ct. 908, rehearing den. 313 U. S. 599, 85 L. Ed. 1551, 61 S. Ct. 1093. See also §§ 732 and 747.

§ 168. Presumptions.

There is no presumption of liability or bad faith against a party to an administrative proceeding. *Boeing Airplane Co. v. National Labor Relations Board* (C. C. A. 10th, 1944) 140 F. (2d) 423.

Where the party on whom rests the burden of evidence as to a particular fact has the evidence within his control and withholds it, the presumption is that such evidence is against his interest. *National Labor Relations Board v. Ohio Calcium Co.* (C. C. A. 6th, 1943) 133 F. (2d) 721.

p. 155, n. 24. *Commissioner of Internal Revenue v. Bain Peanut Co.* (C. C. A. 5th, 1943) 134 F. (2d) 853, dismissed without consideration 321 U. S. 800, 88 L. Ed. 1087, 64 S. Ct. 633.

p. 155, n. 25. *National Labor Relations Board*. See *Republic Aviation Corp. v. National Labor Relations Board* (1945) 324 U. S. 793, 89 L. Ed. 1372, 65 S. Ct. 982.

Processing Tax Board of Review. * *Webre Steib Co. v. Commissioner of Internal Revenue* (1945) 324 U. S. 164, 89 L. Ed. 819, 65 S. Ct. 578; *Commissioner of Internal Revenue v. Bain Peanut Co.* (C. C. A. 5th, 1943) 134 F. (2d) 853, dismissed without consideration 321 U. S. 800, 88 L. Ed. 1087, 64 S. Ct. 633.

Where the subject matter of a presumption is not an indivisible unit, but a sum of money, such as a tax, inherently divisible into fractional parts, the presumption may be rebutted in part and in part remain applicable. *Webre Steib Co. v. Commissioner of Internal Revenue* (1945) 324 U. S. 164, 89 L. Ed. 819, 65 S. Ct. 578. Thus the presumption that the burden of the processing tax was borne by the taxpayer, arising from proof of lower profits during the processing tax period, is not eliminated but only diminished pro tanto to the extent that rebuttal evidence will support a contradictory finding. *Webre Steib Co. v. Commissioner of Internal Revenue* (1945) 324 U. S. 164, 89 L. Ed. 819, 65 S. Ct. 578.

p. 155, n. 26. But see *Allen v. Commissioner of Internal Revenue* (C. C. A. 1st, 1941) 117 F. (2d) 364.

The agency may not rely wholly on the statutory presumption that the burden of a processing tax was borne by the taxpayer, arising from proof of lower profits during the period of the tax, in the presence of contrary evidence sufficient to support a finding that the taxpayer did not absorb the tax. *Webre Steib Co. v. Commissioner of Internal Revenue* (1945) 324 U. S. 164, 89 L. Ed. 819, 65 S. Ct. 578.

p. 155, n. 29. See *Webre Steib Co. v. Commissioner of Internal Revenue* (1945) 324 U. S. 164, 89 L. Ed. 819, 65 S. Ct. 578.

§ 169. Burden of Proof.

The words "burden of proof" are used in two senses: (1) the duty to prove a charge by a degree of proof such as a preponderance of the evidence; and (2) the duty to go forward with the evidence. *Pacific Gas & Electric Co. v. Securities & Exchange Commission* (C. C. A. 9th, 1942) 127 F. (2d) 378.

Where a witness' explanation of the motivating cause of the employer's discharge of employee is reasonable, the burden is on the National Labor Relations Board to establish the falseness of the employer's explanation and the truth of its own theory that the discharge was for union activity. *National Labor Relations Board v. Entwistle Mfg. Co.* (C. C. A. 4th, 1941) 120 F. (2d) 532.

In proceedings before the Tax Court initiated by the taxpayer after an adverse determination by the Commissioner of Internal Revenue, where the question is factual in nature, the burden rests upon the taxpayer to produce sufficient evidence to convince the Tax Court that the Commissioner's decision was wrong. *Commissioner of Internal Revenue v. Tower* (1946) 327 U. S. 280, 90 L. Ed. 670, 66 S. Ct. 532.

In administrative proceedings the burden of proof is on the party claiming that an administrative determination was erroneous. *Brown v. Commissioner of Internal Revenue* (C. C. A. 2d, 1944) 141 F. (2d) 307, cert. den. 323 U. S. 714, 89 L. Ed. 575, 65 S. Ct. 41; *National Weeklies, Inc. v. Commissioner of Internal Revenue* (C. C. A. 8th, 1943) 137 F. (2d) 39.

If the party having the burden of proof in an administrative proceeding presents evidence so equivocal and indefinite as not to afford a satisfactory legal basis for determining the facts, he has failed to sustain the burden of proof. *National Weeklies, Inc. v. Commissioner of Internal Revenue* (C. C. A. 8th, 1943) 137 F. (2d) 39.

It is never the function of a rebuttable presumption to shift the burden of proof. *Commissioner of Internal Revenue v. Bain Peanut Co.* (C. C. A. 5th, 1943) 134 F. (2d) 853, dismissed without consideration 321 U. S. 800, 88 L. Ed. 1087, 64 S. Ct. 633.

Administrative Procedure Act. Under the Administrative Procedure Act, Sec. 7(c), "Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof." See § 165 herein.

p. 156, n. 30. The Federal Power Act, 16 USC 823(a). See *Northwestern Electric Co. v. Federal Power Commission* (C. C. A. 9th, 1943) 134 F. (2d) 740, aff'd 321 U. S. 119, 88 L. Ed. 596, 64 S. Ct. 451.

§ 169A. (New) Stipulations.

Stipulations in administrative proceedings have the same general effect as in judicial proceedings. *Federal Trade Commission v. A. E. Staley Mfg. Co.* (1945) 324 U. S. 746, 89 L. Ed. 1338, 65 S. Ct. 971; *Corn Products Refining Co. v. Federal Trade Commission* (1945) 324 U. S. 726, 89 L. Ed. 1320, 65 S. Ct. 961; *Commissioner of Internal Revenue v. West Production Co.* (C. C. A. 5th, 1941) 121 F. (2d) 9, cert. den. 314 U. S. 682, 86 L. Ed. 546, 62 S. Ct. 186.

See § 516A.

§ 170. (Changed) Judicial Notice: "Official Notice" a Preferable Term.

An administrative agency may not take judicial or official notice of the organization of a union. *National Labor Relations Board v. Hollywood-Maxwell Co.* (C. C. A. 9th, 1942) 126 F. (2d) 815.

p. 156, n. 32. The taking of notice by an administrative agency is preferably termed "official" rather than "judicial" notice. *United States v. Pierce Auto Freight Lines, Inc.* (1946) 327 U. S. 515, 90 L. Ed. 821, 66 S. Ct. 687. See K. C. Davis, "An Approach to Problems of Evidence in the Administrative Process" (1942) 55 Harv. L. Rev. 364.

Administrative Procedure Act. Section 7(d) of the Administrative Procedure Act provides that "where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary."

§ 171A. (New) Witnesses and Expert Testimony in Administrative Proceedings.

There is no denial of due process in permitting members of the agency's staff to testify. *Opp Cotton Mills, Inc. v. Administrator of Wage & Hour Division* (1941) 312 U. S. 126, 85 L. Ed. 624, 61 S. Ct. 524.

There is no denial of due process in permitting the members of an advisory committee to appear at a hearing by counsel to offer evidence in support of its recommendation. *Opp Cotton Mills, Inc. v.*

Administrator of Wage & Hour Division (1941) 312 U. S. 126, 85 L. Ed. 624, 61 S. Ct. 524.

Where the essential basic facts are in the administrative record, there is no duty upon the agency to take expert testimony as a basis for the agency's determination. The agency may make its own determinations from the basic facts, drawing such reasonable inferences as may be necessary. *Market St. Ry. Co. v. Railroad Commissioner of State of California* (1945) 324 U. S. 548, 89 L. Ed. 1171, 65 S. Ct. 770. See § 516A.

Opinions of experts may be received by administrative agencies even when the issue is the sole one in the proceeding. *Express Pub. Co. v. Commissioner of Internal Revenue* (C. C. A. 5th, 1944) 143 F. (2d) 386.

Evidence given to Selective Service Boards by "Advisory Panels" is in the nature of expert testimony. It must be confined to ecclesiastical matters and must be disclosed to the contesting party so that he may challenge it. *United States v. Cain* (C. C. A. 2d, 1945) 149 F. (2d) 338.

See § 590B with respect to expert testimony as substantial evidence. See also § 516.

§ 173. Failure to Use Interim Judicial Remedy to Adduce Evidence.

p. 157, n. 43. *Hershey Chocolate Corp. v. Federal Trade Commission* (C. C. A. 3rd, 1941) 121 F. (2d) 968; *California Lumbermen's Council v. Federal Trade Commission* (C. C. A. 9th, 1940) 115 F. (2d) 178, cert. den. 312 U. S. 709, 85 L. Ed. 1141, 61 S. Ct. 827.

The same rule applies where there has been a failure to use an interim administrative procedure provided to adduce or to produce evidence. *United States v. Morgan* (1941) 313 U. S. 409, 85 L. Ed. 1429, 61 S. Ct. 999.

§ 173A. (New) Reports of Public Officials.

A report of an administrative official, if made under due authority, may be admissible in evidence before an administrative agency under 24 USC 695. *E. K. Hardison Seed Co. v. Jones* (C. C. A. 6th, 1945) 149 F. (2d) 252; *Avon Western Corp. v. Bowles* (Em. App., 1944) 145 F. (2d) 473; *Taylor v. Ratimer* (D. C. W. D. Mo., 1942) 47 F. Supp. 236.

III. EXAMINERS; REPORTS AND EXCEPTIONS THERETO

§ 174. Examiners in General.

Failure to object to the violation of an agency's regulation concerning the admissibility of evidence at the hearing before the examiner does not operate as waiver of the defect, where the objection is properly made to the agency itself. *Bridges v. Wixon* (1945) 326 U. S. 135, 89 L. Ed. 2103, 65 S. Ct. 1443.

Excepting to an examiner's proposed report, under a statutory provision to the effect that no objection not urged before the agency shall be urged in court on judicial review, is essential. See § 239.

The examiner's view as to the credibility of witnesses has been extensively relied upon in certain administrative proceedings. See

Bridges v. Wixon (1945) 326 U. S. 135, 89 L. Ed. 2103, 65 S. Ct. 1443.

Where evidence is taken by an examiner, his report is submitted to the parties, and a hearing held on their exceptions to it, a considerable amount of time ordinarily elapses, and it may be difficult to bring the record up to date. See *Interstate Commerce Commission v. Jersey City* (1944) 322 U. S. 503, 88 L. Ed. 1420, 64 S. Ct. 1129. See also § 318.

Examiners have discretion similar to that of a trial judge in the conduct of hearings. *Segal Lock & Hardware Co. v. Federal Trade Commission* (C. C. A. 2d, 1944) 143 F. (2d) 935, cert. den. 323 U. S. 791, 89 L. Ed. 631, 65 S. Ct. 429. See also § 150A and § 303A.

The function of a trial examiner, as with a trial judge, is to see that facts are clearly and fully developed. He is not required to sit idly by and permit a confused or meaningless record to be made without asking the witness questions. *National Labor Relations Board v. Franks Bros. Co.* (C. C. A. 1st, 1943), 137 F. (2d) 989, aff'd 321 U. S. 702, 88 L. Ed. 1020, 64 S. Ct. 817.

The trial examiner's discretion extends to the granting or denying of continuances. *National Labor Relations Board v. Algoma Plywood & Veneer Co.* (C. C. A. 7th, 1941) 121 F. (2d) 602. See also § 150A.

Administrative Procedure Act. "SEC. 7. In hearings which section 4 or 5 requires to be conducted pursuant to this section—

"(a) PRESIDING OFFICERS.—There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this Act; but nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute. The functions of all presiding officers and of officers participating in decisions in conformity with section 8 shall be conducted in an impartial manner. Any such officer may at any time withdraw if he deems himself disqualified; and, upon the filing in good faith of a timely and sufficient affidavit of personal bias or disqualification of any such officer, the agency shall determine the matter as a part of the record and decision in the case." (Administrative Procedure Act, Sec. 7(a).)

With respect to the powers of officers presiding at administrative hearings, see § 150, note 5, herein, and the Administrative Procedure Act, Sec. 7(b).

See the Administrative Procedure Act, Sec. 8(a) with respect to the broader power now given to presiding officers to make initial decisions which may become final, where the agency does not require otherwise.

With respect to the appointment of examiners, see the Administrative Procedure Act, Sec. 11.

The Administrative Procedure Act, Sec. 8(b), provides: "(b) SUBMITTALS AND DECISIONS.—Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating

in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof."

p. 157, n. 44. With respect to the appropriateness of hearings before examiners, see *Stewart v. United States Civil Service Commission* (D. C. Ga., 1942) 45 F. Supp. 697.

p. 157, n. 45. *Bridges v. Wixon* (1945) 326 U. S. 135, 89 L. Ed. 2103, 65 S. Ct. 1443; *National Labor Relations Board v. Botany Worsted Mills* (C. C. A. 3rd, 1943) 133 F. (2d) 876, cert. den. 319 U. S. 751, 87 L. Ed. 1705, 63 S. Ct. 1164.

p. 158, n. 46. An administrative agency is not required to accept the recommendations of its trial examiner. *National Labor Relations Board v. L. H. Hamel Co.* (C. C. A. 1st, 1943) 135 F. (2d) 71.

The power and responsibility for making findings of fact and the decisions thereon is entrusted to the agency and not the trial examiner. *National Labor Relations Board v. Weirton Steel Co.* (C. C. A. 3rd, 1943) 135 F. (2d) 494.

§ 174A. (New) — Examiners: Other Phrases.

The functions of an examiner are performed by a "joint board" under the Motor Carrier Act of 1935, *American Trucking Ass'ns, Inc. v. United States* (1945) 326 U. S. 77, 89 L. Ed. 2065, 65 S. Ct. 1499; by a "hearing commissioner" under the Alcohol Administration Act, *Levers v. Anderson* (1945) 326 U. S. 219, 90 L. Ed. 26, 66 S. Ct. 72; and by an "inspector" under the Immigration Act. *Bridges v. Wixon* (1945) 326 U. S. 135, 89 L. Ed. 2103, 65 S. Ct. 1443.

CHAPTER 12

REPORT AND ORDER

§ 176. Definiteness Essential.

p. 159, n. 3. See § 786.

Administrator of Wage and Hour Division. *Pearson v. Walling* (C. C. A. 8th, 1943) 138 F. (2d) 655, cert. den. 321 U. S. 775, 88 L. Ed. 1069, 64 S. Ct. 616.

Federal Trade Commission. *American Chain & Cable Co. v. Federal Trade Commission* (C. C. A. 4th, 1944) 139 F. (2d) 622.

National Labor Relations Board. *National Labor Relations Board v. Lipshutz* (C. C. A. 5th, 1945) 149 F. (2d) 141; *National Labor Relations Board v. General Motors Corp.* (C. C. A. 7th, 1940) 116 F. (2d) 306; *National Labor Relations Board v. Swift & Co.* (C. C. A. 8th, 1940) 116 F. (2d) 143.

p. 159, n. 4. *Illinois Commerce Commission v. Thomson* (1943) 318 U. S. 695, 87 L. Ed. 1075, 63 S. Ct. 834.

§ 178. Inconsistencies Unimportant.

A conflict in the reports of an administrative agency has been referred to by a reviewing court construing a statute. *Barrett Lines, Inc. v. United States* (1945) 326 U. S. 179, 89 L. Ed. 2128, 65 S. Ct. 1504.

p. 160, n. 9. *Northern Pac. Ry. Co. v. United States* (D. C. D. Minn., Fourth Div., 1941) 41 F. Supp. 439. See note, "Stare Decisis in N.L.R.B. and S.E.C." (1939) 16 New York University L. Q. 618. See also § 255 et seq.

§ 179. Effect of Dissent by Members of Agency.

Dissent by a member of an agency may have a material bearing upon the question as to whether the agency's findings are substantially supported. *Wyman-Gordon Co. v. National Labor Relations Board* (C. C. A. 7th, 1946) 153 F. (2d) 480.

The views of dissenting members of an administrative agency have been referred to by a reviewing court. *Barrett Lines, Inc. v. United States* (1945) 326 U. S. 179, 89 L. Ed. 2128, 65 S. Ct. 1504.

p. 160, n. 10. *Interstate Commerce Commission. Doyle Transfer Co., Inc. of Glasgow, Ky. v. United States* (D. C. D. Col., 1942) 45 F. Supp. 691.

National Labor Relations Board. *Wyman-Gordon Co. v. National Labor Relations Board* (C. C. A. 7th, 1946) 153 F. (2d) 480; *National Labor Relations Board v. Ohio Calcium Co.* (C. C. A. 6th, 1943) 133 F. (2d) 721; *Sperry Gyroscope Co. v. National Labor Relations Board* (C. C. A. 2d, 1942) 129 F. (2d) 922.

§ 180. Nature of Administrative Order: Analogy to Court Injunction.

Where repeated violations of the Labor Relations Act by an association of employers have been proved, the National Labor Relations Board's order may properly restrain the association from committing future violations with any other members of the association. *National Labor Relations Board v. Sun Tent-Luebbert Co.* (C. C. A. 9th, 1945) 151 F. (2d) 483.

An administrative order is legislative, not judicial, and operates prospectively rather than retroactively. *Bowles v. Lake Lucerne Plaza, Inc.* (C. C. A. 5th, 1945) 148 F. (2d) 967, cert. den. 326 U. S. 726, 90 L. Ed. 430, 66 S. Ct. 31.

An Order to Report of a Selective Service Board is not a discretionary order, requiring a meeting and determination of the Board before issue. It can be signed by a single member for the whole Board. *United States v. Gormly* (C. C. A. 7th, 1943) 136 F. (2d) 227, cert. den. 320 U. S. 753, 88 L. Ed. 448, 64 S. Ct. 60.

Unless a statute gives an administrative order the force of law when judicial review is not sought, the order is not self-executing. *Utah Copper Co. v. National Labor Relations Board* (C. C. A. 10th, 1943) 136 F. (2d) 485. See § 257.

The scope of an administrative proceeding is measured by the directory part of the administrative order, not by its recitals, save as those may be necessary to throw light upon the rest; nor by what the parties said in their arguments and briefs, or in the course of the hearings. *W. R. Grace & Co. v. Civil Aeronautics Board* (C. C. A. 2d, 1946) 154 F. (2d) 271.

Administrative Procedure Act. "(d) ORDER AND ADJUDICATION.—'Order' means the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rule making but including licensing. 'Adjudication' means agency process for the formulation of an order." (Administrative Procedure Act, Sec. 2(d).)

Under Sec. 5(d) of the Administrative Procedure Act agencies are authorized to issue declaratory orders: "(d) DECLARATORY ORDERS.—The agency is authorized in its sound discretion, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty."

p. 160, n. 12. *May Department Stores Co. v. National Labor Relations Board* (1945) 326 U. S. 376, 90 L. Ed. 145, 66 S. Ct. 203. See *Hudson Motor Car Co. v. Detroit* (C. C. A. 6th, 1943) 136 F. (2d) 574. But see *Bowles v. Skaggs* (C. C. A. 6th, 1945) 151 F. (2d) 817.

p. 161, n. 13. *National Labor Relations Board v. Express Publishing Co.* (1941) 312 U. S. 426, 85 L. Ed. 930, 61 S. Ct. 693; *National Labor Relations Board v. Lipshutz* (C. C. A. 5th, 1945) 149 F. (2d) 141; *Bowles v. May Hardwood Co.* (C. C. A. 6th, 1944) 140 F. (2d) 914.

p. 161, n. 14. See §§ 437, 786.

National Labor Relations Board. * *May Department Stores Co. v. National Labor Relations Board* (1945) 326 U. S. 376, 90 L. Ed. 145, 66 S. Ct. 203; *National Labor Relations Board v. Express Publishing Co.* (1941) 312 U. S. 426, 85 L. Ed. 930, 61 S. Ct. 693; *National Labor Relations Board v. Lipshutz* (C. C. A. 5th, 1945) 149 F. (2d) 141.

Price Administrator. *Bowles v. May Hardwood Co.* (C. C. A. 6th, 1944) 140 F. (2d) 914.

§ 180A. (New) Consent Orders.

An administrative order may be entered on the consent of the parties. *Pittsburgh Plate Glass Co. v. National Labor Relations Board* (1941) 313 U. S. 146, 85 L. Ed. 1251, 61 S. Ct. 908, rehearing den. 313 U. S. 599, 85 L. Ed. 1551, 61 S. Ct. 1093.

§ 180B. (New) Time as of Which Order Speaks.

An order speaks as of the time of the hearing, and is founded upon the record before the agency, so that if subsequent or unproved events furnish a defense in whole or in part to the enforcement of the order or part of it, such a defense cannot affect the validity of the order itself. *National Labor Relations Board v. Acme Air Appliance Co., Inc.* (C. C. A. 2nd, 1941) 117 F. (2d) 417.

§ 181. Agency's Stay of Order.

p. 161, n. 17. **Administrative Procedure Act.** "(d) INTERIM RELIEF.—Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings." (Administrative Procedure Act, Sec. 10(d).)

§ 182. Against Whom Orders May Run.

An order of the National Labor Relations Board may be enforceable against employers not parties to the proceedings, where violations by them are threatened. *National Labor Relations Board v. Sun Tent-Luebbert Co.* (C. C. A. 9th, 1945) 151 F. (2d) 483.

An administrative order may be directed to the "successors and assigns" of the defendant. *National Labor Relations Board v. Gluek Brewing Co.* (C. C. A. 8th, 1944) 144 F. (2d) 847; *National Labor Relations Board v. Brezner Tanning Co.* (C. C. A. 1st, 1944) 141 F. (2d) 62.

An administrative order may run against a partnership which succeeds to the business of a dissolved corporation, although based in part on findings made as to the corporation, when the same individuals remain in control of the business. *De Bardeleben v. National Labor Relations Board* (C. C. A. 5th, 1943) 135 F. (2d) 13.

An administrative order may run against a corporation dissolved before the order was issued, where a state statute provides for the existence of dissolved corporations as bodies corporate for a term after dissolution. *De Bardeleben v. National Labor Relations Board* (C. C. A. 5th, 1943) 135 F. (2d) 13.

An administrative order may run against a successor corporation formed after bankruptcy and reorganization. *National Labor Relations Board v. Baldwin Locomotive Works* (C. C. A. 3rd, 1942) 128 F. (2d) 39. See § 786.

p. 161, n. 18. *Gelb v. Federal Trade Commission* (C. C. A. 2d, 1944) 144 F. (2d) 580.

§ 182A. (New) Delay in Handing Down Order.

The Supreme Court has criticized undue delay in the handing down of administrative orders. The handling of complaints as quickly as is consistent with good administration is essential. *National Labor Relations Board v. Electric Vacuum Cleaner Co.* (1942) 315 U. S. 685, 86 L. Ed. 1120, 62 S. Ct. 846, rehearing den. 316 U. S. 708, 86 L. Ed. 1775, 62 S. Ct. 1038. See *Interstate Commerce Commission v. Jersey City* (1944) 322 U. S. 503, 88 L. Ed. 1420, 64 S. Ct. 1129.

If the delay were shown to be arbitrary it would probably fall under the Constitution's condemnation of all arbitrary action. See § 597 and the chapter on Procedural Due Process, § 274 et seq. See also the Administrative Procedure Act, Sec. 10(e), and Sec. 689 herein.

§ 182B. (New) Form of Order: Necessity of Contentions with Respect Thereto.

Where there is an applicable statutory provision to the effect that no objection not urged before the agency may be urged in court on judicial review, objections to the inclusion of a certain paragraph in an administrative order may not be urged in judicial review if they were not urged before the agency. *National Labor Relations Board v. Cheney California Lumber Co.* (1946) 327 U. S. 385, 90 L. Ed. 739, 66 S. Ct. 553.

§ 182C. (New) Single Report Proper for Two or More Proceedings.

An agency may write one report, rather than two, especially in matters closely related, if the single report together with the findings and the evidence is sufficient to sustain the action in each case. *United States v. Pierce Auto Freight Lines, Inc.* (1946) 327 U. S. 515, 90 L. Ed. 821, 66 S. Ct. 687.

§ 182D. (New) Administrative Reports Not Constructive Notice.

The publication in the Federal Register of an administrative regulation is constructive notice of its contents to all persons affected. See § 501A.

Reports of administrative agencies do not put parties to other proceedings on constructive notice of the facts stated and are not binding on other parties. Litigants are not bound to take notice of executive decisions on legal questions. *Todd v. Securities & Exchange Commission* (C. C. A. 6th, 1943) 137 F. (2d) 475.

Notes of the Secretary of State which were not published in the Federal Register were not intended to have general application and legal effect. *United States v. Birnbaum* (D. C. S. D. N. Y., 1944) 55 F. Supp. 356.

Administrative Procedure Act. "Sec. 3. Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of an agency—

"(a) RULES.—Every agency shall separately state and currently publish in the Federal Register (1) descriptions of its central and field organization including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or requests; (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law. No person shall in any manner be required to resort to organization or procedure not so published.

"(b) OPINIONS AND ORDERS.—Every agency shall publish or, in accordance with published rule, make available to public inspection all final opinions or orders in the adjudication of cases (except those required for good cause to be held confidential and not cited as precedents) and all rules.

"(c) PUBLIC RECORDS.—Save as otherwise required by statute, matters of official record shall in accordance with published rule be made available to persons properly and directly concerned except information held confidential for good cause found." (Administrative Procedure Act, Sec. 3.)

CHAPTER 13

REOPENING, REHEARING, REARGUMENT AND RECONSIDERATION

§ 183. Reopening and Reconsideration Part of the Legislative Process.

p. 162, n. 6. *Sprague v. Woll* (C. C. A. 7th, 1941) 122 F. (2d) 128, cert. den. 314 U. S. 669, 86 L. Ed. 535, 62 S. Ct. 131; *Grandview Dairy, Inc. v. Jones* (D. C. E. D. N. Y., 1945) 61 F. Supp. 460, citing this section. See *Wallace Corp. v. National Labor Relations Board* (1944) 323 U. S. 248, 89 L. Ed. 216, 65 S. Ct. 238.

p. 163, n. 7. *Sprague v. Woll* (C. C. A. 7th, 1941) 122 F. (2d) 128, cert. den. 314 U. S. 669, 86 L. Ed. 535, 62 S. Ct. 131.

§ 184. When Rehearing Application May Be Made.

The power of the Tax Court to grant a rehearing must be exercised within the three months' period during which a petition for review of the Tax Court's decision must be filed, or not at all. *Sweet v. Commissioner of Internal Revenue* (C. C. A. 1st, 1941) 120 F. (2d) 77.

§ 185. Right to Rehearing.

"Rehearing," "reopening" and "reconsideration" are in substance merely different terms for the same thing; the cases have been assimilated in this section inasmuch as "rehearing" is the term in commonest use.

Rehearing in an administrative proceeding is not a matter of right but lies in the discretion of the agency making the order. The courts will interfere on judicial review only where there has been an abuse of discretion. Without this well-settled rule there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening.

Federal Trade Commission. *Loughran v. Federal Trade Commission* (C. C. A. 8th, 1944) 143 F. (2d) 431.

Interstate Commerce Commission. *United States v. Pierce Auto Freight Lines, Inc.* (1946) 327 U. S. 515, 90 L. Ed. 821, 66 S. Ct. 687; * *Interstate Commerce Commission v. Jersey City* (1944) 322 U. S. 503, 88 L. Ed. 1420, 64 S. Ct. 1129; *Carolina Scenic Coach Lines v. United States* (D. C. W. D. N. C., Asheville Div., 1945) 59 F. Supp. 336; *Service Trucking Co. v. United States* (D. C. S. Md., 1944) 56 F. Supp. 1003; *Royal Cadillac Service Inc. v. United States* (D. C. S. D. N. Y., 1942) 52 F. Supp. 225. See *United States v. Wabash R. Co.* (1944) 322 U. S. 198, 88 L. Ed. 1225, 64 S. Ct. 974.

National Labor Relations Board. *New Idea, Inc. v. National Labor Relations Board* (C. C. A. 7th, 1941) 117 F. (2d) 517.

Tax Court. *Barnhart-Morrow Consolidated v. Commissioner of Internal Revenue* (C. C. A. 9th, 1945) 150 F. (2d) 285; *Chiquita Mining Co. v. Commissioner of Internal Revenue* (C. C. A. 9th, 1945)

148 F. (2d) 306; *Standard Knitting Mills v. Commissioner of Internal Revenue* (C. C. A. 6th, 1944) 141 F. (2d) 195, cert. den. 322 U. S. 753, 88 L. Ed. 1583, 64 S. Ct. 1266; *Skenandoa Rayon Corp. v. Commissioner of Internal Revenue* (C. C. A. 2d, 1941) 122 F. (2d) 268, cert. den. 314 U. S. 696, 86 L. Ed. 556, 62 S. Ct. 413.

See § 245.

The right to a rehearing is discussed from the standpoint of procedural due process in § 318.

Orders rendered inappropriate by changed conditions may be modified or vacated, even after their enforcement has been decreed on judicial review. *American Chain & Cable Co. v. Federal Trade Commission* (C. C. A. 4th, 1944) 142 F. (2d) 909.

The conditions under which an administrative proceeding may be reopened may be controlled by statute, and in that event the proceeding may not be reopened except for the conditions specified. *Texas Employers Ins. Ass'n v. Sheppard* (D. C. S. D. Tex., Houston Div., 1938) 42 F. Supp. 669.

If the party claiming a rehearing has had ample opportunity to present the evidence used as a reason for seeking rehearing, it is no abuse of discretion to deny the motion for rehearing. *Barnhart-Morrow Consolidated v. Commissioner of Internal Revenue* (C. C. A. 9th, 1945) 150 F. (2d) 285; *Athens Roller Mills Inc. v. Commissioner of Internal Revenue* (C. C. A. 6th, 1943) 136 F. (2d) 125.

To support a request for a rehearing, new evidence must be not merely cumulative, and, if it existed prior to the original hearing, some adequate reason why it was not offered therein must be given. *New Idea, Inc. v. National Labor Relations Board* (C. C. A. 7th, 1941) 117 F. (2d) 517.

p. 164, n. 17. *Chiquita Mining Co. v. Commissioner of Internal Revenue* (C. C. A. 9th, 1945) 143 F. (2d) 306; *Wong Hong Jim v. Carmichael* (C. C. A. 9th, 1940) 115 F. (2d) 529.

§ 186. Duty to Reopen.

"Rehearing" and "reopening" are substantially similar in purpose and effect, subject to the same rules. This section should be read together with § 185 where the bulk of the cases are collected.

p. 164, n. 20. See also §§ 185 and 318.

p. 164, n. 22. * *Scott v. Commissioner of Internal Revenue* (C. C. A. 8th, 1941) 117 F. (2d) 36.

p. 164, n. 23. *Peoria Tribe of Indians v. Wea Townsite Co.* (C. C. A. 10th, 1941) 117 F. (2d) 940.

BOOK III

JUDICIAL REVIEW

PART I

THE RIGHT TO JUDICIAL REVIEW

CHAPTER 14

IN GENERAL

I. BASIS OF RIGHT TO JUDICIAL REVIEW: LEGAL RIGHTS MUST BE AFFECTED

§ 188. Right to Judicial Review Only Where Legal Rights Affected.

Opportunity to be heard on a matter within the administrative discretion of the agency does not diminish the party's legal standing to attack the resulting order as exceeding the powers of the agency. *Stark v. Wickard* (1944) 321 U. S. 288, 88 L. Ed. 733, 64 S. Ct. 559.

p. 167, n. 5. **Administrative Procedure Act.** "(a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof." (Administrative Procedure Act, Sec. 10(a).)

Federal Communications Commission. *Federal Communications Commission v. National Broadcasting Co., Inc.* (1943) 319 U. S. 239, 87 L. Ed. 1374, 63 S. Ct. 1035; *Columbia Broadcasting System v. United States* (1942) 316 U. S. 407, 86 L. Ed. 1563, 62 S. Ct. 1194; *Colorado Radio Corp. v. Federal Communications Commission* (App. D. C., 1941) 118 F. (2d) 24.

Federal Power Commission. *Federal Power Commission v. Hope Natural Gas Co.* (1944) 320 U. S. 591, 88 L. Ed. 333, 64 S. Ct. 281.

Federal Security Administrator. *United States Cane Sugar Refiners' Ass'n v. McNutt* (C. C. A. 2d, 1943) 138 F. (2d) 116; *Land O'Lakes Creameries v. McNutt* (C. C. A. 8th, 1943) 132 F. (2d) 653.

Interstate Commerce Commission. *Schenley Distillers Corp. v. United States* (1946) 326 U. S. 432, 90 L. Ed. 181, 66 S. Ct. 247; *Mitchell v. United States* (1941) 313 U. S. 80, 85 L. Ed. 1201, 61 S. Ct. 873; *Inland Motor Freight v. United States* (D. C. D. Idaho, 1941) 36 F. Supp. 885.

National Labor Relations Board. *Regal Knitwear Co. v. National Labor Relations Board* (1945) 324 U. S. 9, 89 L. Ed. 661, 65 S. Ct. 478; *National Labor Relations Board v. National Mineral Co.* (C. C. A. 7th, 1943) 134 F. (2d) 424, cert. den. 320 U. S. 753, 88 L. Ed. 448, 64 S. Ct. 58; *Zimmer-Thomson Corp. v. National Labor Relations Board* (D. C. S. D. N. Y., 1945) 60 F. Supp. 84; *Inland Empire District Council, Lumber & Sawmill Workers Union, Lewis-ton, Idaho v. Graham* (D. C. W. D. Wash. N. D., 1943) 53 F. Supp. 369.

The President. *State of Wyoming v. Franke* (D. C. D. Wyo., 1945) 58 F. Supp. 890.

Secretary of Agriculture. **Stark v. Wickard* (1944) 321 U. S. 288, 88 L. Ed. 733, 64 S. Ct. 559; *Queensboro Farms Products Co. v. Wickard* (C. C. A. 2d, 1943) 137 F. (2d) 969; *A. E. Staley Mfg. Co. v. Secretary of Agriculture* (C. C. A. 7th, 1941) 120 F. (2d) 258.

Secretary of the Treasury. See *Barr v. United States* (1945) 324 U. S. 83, 89 L. Ed. 765, 65 S. Ct. 522.

Securities and Exchange Commission. *American Power & Light Co. v. Securities & Exchange Commission* (1945) 325 U. S. 385, 89 L. Ed. 1683, 65 S. Ct. 1254; *Commonwealth & Southern Corp. v. Securities & Exchange Commission* (C. C. A. 3rd, 1943) 134 F. (2d) 747.

War Manpower Commission. *England v. Devine* (D. C. D. Mass., 1945) 59 F. Supp. 379.

Law Review Article. See Jennings Roberts, "What Orders of an Administrative Body Are Reviewable?" (1942) 31 *Georgetown L. J.* 40.

p. 168, n. 8. *Stark v. Wickard* (1944) 321 U. S. 288, 88 L. Ed. 733, 64 S. Ct. 559.

p. 168, n. 10. *Regal Knitwear Co. v. National Labor Relations Board* (1945) 324 U. S. 9, 89 L. Ed. 661, 65 S. Ct. 478.

p. 168, n. 12. **Federal Communications Commission.** *Colorado Radio Corp. v. Federal Communications Commission* (App. D. C., 1941) 118 F. (2d) 24.

Federal Power Commission. *United States v. Appalachian Electric Power Co.* (1940) 311 U. S. 377, 85 L. Ed. 243, 61 S. Ct. 291, rehearing den. 312 U. S. 712, 85 L. Ed. 1143, 61 S. Ct. 548.

Secretary of Agriculture. *A. E. Staley Mfg. Co. v. Secretary of Agriculture* (C. C. A. 7th, 1941) 120 F. (2d) 258.

Securities and Exchange Commission. *American Power & Light Co. v. Securities & Exchange Commission* (1945) 325 U. S. 385, 89 L. Ed. 1683, 65 S. Ct. 1254.

p. 169, n. 13. **Federal Communications Commission v. National Broadcasting Co., Inc.** (1943) 319 U. S. 239, 87 L. Ed. 1374, 63 S. Ct. 1035; *Simmons v. Federal Communications Commission* (App. D. C., 1944) 145 F. (2d) 578; *United States Cane Sugar Refiners' Ass'n v. McNutt* (C. C. A. 2d, 1943) 138 F. (2d) 116.

§ 188A. (New) Where Congress Creates a Statutory Privilege.

Where a claim is created against the United States, a mere bounty or gratuity is conferred, and even if the claimant alleges that administrative officials have placed unlawful restrictions upon his claim, no legal rights of his in the constitutional sense have been affected. See § 204. Indeed, the conferring of a bounty or gratuity is in substance the conferring of a mere statutory privilege, and thus these phrases appear to amount to the same thing. Compare §§ 3, 41, 188.

Where a statutory privilege is created by Congress it becomes a legal right in the strict sense only if the nature and character of the legislation show that Congress intended to create a statutory privilege protected by judicial remedies. *Stark v. Wickard* (1944) 321 U. S. 288, 88 L. Ed. 733, 64 S. Ct. 559. Compare §§ 3, 41.

Where no constitutional question is present, and the claimant's only legal basis is statutory, a construction of the statute will determine whether Congress intended to give legal rights which can be the basis for judicial review. *Switchmen's Union v. National Mediation Board* (1943) 320 U. S. 297, 88 L. Ed. 61, 64 S. Ct. 95. See also *Stark v. Wickard* (1944) 321 U. S. 288, 88 L. Ed. 733, 64 S. Ct. 559.

Bounties, gratuities and mere statutory privileges are to be profoundly distinguished from legal rights, inasmuch as "cases" and "con-

troversies'' under Article III of the Constitution may arise only where legal rights are involved. See § 41 et seq. and § 197, and *Stark v. Wickard* (1944) 321 U. S. 288, 88 L. Ed. 733, 64 S. Ct. 559.

§ 189. Examples.

Competitors of a party to whom a certificate was granted under the Motor Carrier Act have legal standing to seek judicial review, as they clearly have a stake as carriers in the transportation situation which the order of the Commission affected. *Alton R. Co. v. United States* (1942) 315 U. S. 15, 86 L. Ed. 586, 62 S. Ct. 432.

A party has legal standing to attack regulations which purport to alter and affect adversely his contractual rights and business relations with others. *Columbia Broadcasting System v. United States* (1942) 316 U. S. 407, 86 L. Ed. 1563, 62 S. Ct. 1194.

A party has standing to attack administrative action which would unlawfully deplete a fund of money to his injury. *Z. & F. Assets Realization Corp. v. Hull* (1941) 311 U. S. 470, 85 L. Ed. 288, 61 S. Ct. 351. See *Stark v. Wickard* (1944) 321 U. S. 288, 88 L. Ed. 733, 64 S. Ct. 559.

Under the statute authorizing Indians to commence and prosecute actions in relation to their right to land, in the Federal District Courts, 25 USC 345, judicial review may be obtained of the Secretary of the Interior's discretionary refusal to approve a claim complete in all respects but for such approval. *Arenas v. United States* (1944) 322 U. S. 419, 88 L. Ed. 1363, 64 S. Ct. 1090.

The Agricultural Marketing Agreement Act of 1937, 7 USC 601 et seq. creates a statutory legal right to a uniform minimum price for milk sold by producers to handlers in a regulated area such that a producer affected by an order of the Secretary of Agriculture resulting in an unauthorized reduction of the price had standing to sue in the Federal District Court for an injunction restraining the enforcement of the order. *Stark v. Wickard* (1944) 321 U. S. 288, 88 L. Ed. 733, 64 S. Ct. 559. The fact that the producer might choose not to sell in the pre-regulated market did not deprive him of the right to challenge the authority of the regulation if he did choose to sell in such market. *Stark v. Wickard* (1944) 321 U. S. 288, 88 L. Ed. 733, 64 S. Ct. 559.

§ 190. — Affecting a Competitive Advantage Insufficient.

p. 170, n. 25. *United States Cane Sugar Refiners' Ass'n v. McNutt* (C. C. A. 2d, 1943) 138 F. (2d) 116.

When the application for a radio station permit has been properly denied, the applicant is not "adversely affected" by the granting of a permit to a competitor who intervened in the proceedings, and so cannot obtain judicial review of the grant to the competitor. *Simmons v. Federal Communications Commission* (App. D. C., 1944) 145 F. (2d) 578.

Recent cases, however, hold that administrative action which has the effect of diverting business to a competitor, to the financial injury of the plaintiff, affects his legal rights and gives him legal standing to bring judicial review.

Civil Aeronautics Board. *Pan American Airways Co. v. Civil Aeronautics Board* (C. C. A. 2d, 1941) 121 F. (2d) 810.

Federal Security Administrator. *Land O'Lakes Creameries, Inc. v. McNutt* (C. C. A. 8th, 1943) 132 F. (2d) 653.

Interstate Commerce Commission. See *McCracken v. United States* (D. C. D. Ore., 1942) 47 F. Supp. 444 and *Consolidated Freightways v. United States* (D. C. D. Utah, 1940) 34 F. Supp. 576.

A competing carrier directly affected, and whose revenues are directly affected, by the award of a certificate of public convenience and necessity to another carrier, may bring judicial review. See *Inland Motor Freight v. United States* (D. C. D. Idaho, 1941) 36 F. Supp. 885.

§ 191. — Speculative Interest Insufficient.

p. 171, n. 30. See *National War Labor Board v. United States Gypsum Co.* (App. D. C., 1944) 145 F. (2d) 97, cert. den. 324 U. S. 856, 89 L. Ed. 1415, 65 S. Ct. 857.

p. 172, n. 31. See § 194A.

§ 191A. (New) Other Examples of Insufficient Legal Interest.

A party permitted to intervene in the administrative proceedings and in the review litigation in the District Court, without other interest than the desire to prevent a decision which might adversely affect its position in a suit pending in another court, lacked legal standing to prosecute an independent appeal from an adverse judgment in the litigation. Whether the party had sufficient interest to intervene as of right before the agency or the District Court was expressly left open. *Boston Tow Boat Co. v. United States* (1944) 321 U. S. 632, 88 L. Ed. 975, 64 S. Ct. 776.

§ 192. Intervention in Administrative Proceedings Inconclusive.

An intervenor, without other interest in a litigation attacking an administrative order than the desire to prevent a decision which might adversely affect its position in another action then pending in another court, lacks standing to take an independent appeal from an adverse judgment in such litigation. *Boston Tow Boat Co. v. United States* (1944) 321 U. S. 632, 88 L. Ed. 975, 64 S. Ct. 776. Whether such an intervenor had sufficient interest to intervene as of right before the agency and in the District Court was expressly left open in the case just cited.

Nor will intervention in the administrative proceedings as well as the review litigation in a Federal District Court necessarily entitle such intervenor to take an independent appeal to the Supreme Court. *Boston Tow Boat Co. v. United States* (1944) 321 U. S. 632, 88 L. Ed. 975, 64 S. Ct. 776.

§ 193. Lack of Intervention in Administrative Proceedings Inconclusive.

p. 174, n. 45. *Columbia Broadcasting System v. United States* (1942) 316 U. S. 407, 86 L. Ed. 1563, 62 S. Ct. 1194.

§ 194. Right to Intervene on Judicial Review Inconclusive.

An intervenor in the administrative proceedings as well as the review litigation in a District Court, without other interest than the decree to prevent a decision which might adversely affect its position in another action in another court, lacked legal standing to take an

independent appeal from an adverse judgment in such litigation. *Boston Tow Boat Co. v. United States* (1944) 321 U. S. 632, 88 L. Ed. 975, 64 S. Ct. 776.

§ 194A. (New) Stockholders.

Stockholders, either minority, **American Power & Light Co. v. Securities & Exchange Commission* (1945) 325 U. S. 385, 89 L. Ed. 1683, 65 S. Ct. 1254, or parent, *Schenley Distillers Corp. v. United States* (1946) 326 U. S. 432, 90 L. Ed. 181, 66 S. Ct. 247, have no right to obtain judicial review of an administrative order which merely affects the legal rights of the corporation.

But where as an individual or separate entity a stockholder has a substantial financial or economic interest distinct from that of the corporation, which is directly and adversely affected by an order of the agency irrespective of any effect the order may have on the corporation, he may bring judicial review as a "person aggrieved" within the meaning of the Public Utilities Holding Company Act of 1935, § 24(a), 15 USC 79x(a). *American Power & Light Co. v. Securities & Exchange Commission* (1945) 325 U. S. 385, 89 L. Ed. 1683, 65 S. Ct. 1254.

Thus a stockholder has the requisite legal standing where the order has a direct adverse effect upon him as a stockholder entitled to dividends. *American Power & Light Co. v. Securities & Exchange Commission* (1945) 325 U. S. 385, 89 L. Ed. 1683, 65 S. Ct. 1254.

Also where the suit for judicial review of an administrative order, although in the nature of a derivative or stockholder's action, charges illegality or fraud so that application to the board of directors would have been futile, the minority stockholder has legal standing to bring judicial review. *American Power & Light Co. v. Securities & Exchange Commission* (1945) 325 U. S. 385, 89 L. Ed. 1683, 65 S. Ct. 1254. See also §§ 191 and 718.

§ 194B. (New) Where Party Acquiesces in Action of Agency.

There is no right to judicial review of an administrative order insofar as the agency has been specifically advised of acquiescence in it by the party thereafter complaining. Under these circumstances there would appear to be no case or controversy. See *United States v. Hancock Truck Lines* (1945) 324 U. S. 774, 89 L. Ed. 1357, 65 S. Ct. 1003. See § 41.

II. RIGHT TO REVIEW ORDERS

§ 195. Orders Generally Required.

Administrative orders are the usual subject of judicial review. See Frederick F. Blachly and Miriam E. Oatman, "Statutory Administrative Orders" (1940) 25 Iowa L. Rev. 582.

A determination by the Interstate Commerce Commission of the amounts which could legally be paid by railroads to shipper-lessees for the use of cars, after which the Commission terminated the pro-

ceedings, was a reviewable "order." *El Dorado Oil Works v. United States* (1946) 328 U. S. 12, 90 L. Ed. 1053, 66 S. Ct. 843.

Where no warrant of deportation has been issued, action of the immigration authorities is not reviewable by habeas corpus proceedings. *United States v. Uhl* (C. C. A. 2d, 1944) 144 F. (2d) 286.

Denial of a motion for rehearing is not a reviewable order. *Oviatt's v. Commissioner of Internal Revenue* (C. C. A. 9th, 1942) 128 F. (2d) 352.

§ 196. Orders of Definitive Character May Be Reviewed by Party Affected.

p. 176, n. 54. **Federal Alcohol Administration.** *Strauss v. Berkshire* (C. C. A. 8th, 1942) 132 F. (2d) 530.

Federal Power Commission. *Louisville Gas & Electric Co. v. Federal Power Commission* (C. C. A. 6th, 1942) 129 F. (2d) 126, cert. den. 318 U. S. 761, 87 L. Ed. 1133, 63 S. Ct. 559.

Secretary of Agriculture. * *Stark v. Wickard* (1944) 321 U. S. 288, 88 L. Ed. 733, 64 S. Ct. 559.

Law Review Articles. See Law Review note (1942) 42 Columbia L. Rev. 1197; note (1940) 8 University of Chicago L. Rev. 113.

p. 176, n. 57. *Guaranty Underwriters, Inc. v. Securities & Exchange Commission* (C. C. A. 5th, 1942) 131 F. (2d) 370; *Aluminum Co. of America v. Federal Power Commission* (App. D. C., 1942) 130 F. (2d) 445.

§ 197. Orders Which Have a Definitive Character.

Administrative Procedure Act. Under the Administrative Procedure Act, Sec. 10(c), "Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review."

Where an Act which creates a statutory privilege also contains definite prohibitions of conduct or the rights are mandatory in form, the order has a definitive character which will be enforced judicially. *Stark v. Wickard* (1944) 321 U. S. 288, 88 L. Ed. 733, 64 S. Ct. 559.

A regulation imposing an assessment on persons engaged in a certain business is an order of definitive character which is judicially reviewable. *Varney v. Warehime* (C. C. A. 6th, 1945) 147 F. (2d) 238, cert. den. 325 U. S. 882, 89 L. Ed. 1997, 65 S. Ct. 1575.

An order requiring a corporation to appear and produce documents before the administrative agency in response to a subpoena duces tecum is a "final order" subject to judicial review. *Penfield Co. of California v. Securities & Exchange Commission* (C. C. A. 9th, 1944) 143 F. (2d) 746. See § 607 et seq.

Denial by the Tax Court of a motion to vacate a decision of the Board of Tax Appeals is reviewable as a decision dismissing the motion for want of jurisdiction. *White's Will v. Commissioner of Internal Revenue* (C. C. A. 3rd, 1944) 142 F. (2d) 746.

Denial by the Tax Court of a motion to open a default is a reviewable decision. *Monjar v. Commissioner of Internal Revenue* (C. C. A. 2d, 1944) 140 F. (2d) 263.

An order directing the establishment of accounts showing a debit balance in the fixed capital assets is a definitive order and is reviewable. *Louisville Gas & Electric Co. v. Federal Power Commission*

(C. C. A. 6th, 1942) 129 F. (2d) 126, cert. den. 318 U. S. 761, 87 L. Ed. 1133, 63 S. Ct. 559.

§ 198. — Order Not Reviewable Under Particular Statute in Jurisdiction of Particular Court.

p. 178, n. 73. See *Zimmer-Thomson Corp. v. National Labor Relations Board* (D. C. S. D. N. Y., 1945) 60 F. Supp. 84. See § 650.

§ 199. Orders Which Do Not Have a Definitive Character.

§ 200. — Orders of Preliminary or Procedural Character.

An order which may have the effect of forbidding or compelling conduct on the part of a complainant, but only on contingency of future administrative action, is not reviewable. *East Ohio Gas Co. v. Federal Power Commission* (C. C. A. 6th, 1940) 115 F. (2d) 385.

Orders refusing to remove a trial examiner or to grant a continuance are not final orders, do not have a definitive character, and are not reviewable. *Okin v. Securities & Exchange Commission* (C. C. A. 2d, 1944) 143 F. (2d) 960.

An order denying a motion to dismiss an application in an administrative proceeding is a mere preliminary order, not affecting the legal rights of the litigant, and not subject to judicial review. *John J. Casale, Inc. v. United States* (D. C. D. Del., 1943) 52 F. Supp. 1005, aff'd 321 U. S. 752, 88 L. Ed. 1052, 64 S. Ct. 640.

An order which determines status, but which does not necessarily or immediately require obedience to any mandatory order applicable to all having such status, is not reviewable. *East Ohio Gas Co. v. Federal Power Commission* (C. C. A. 6th, 1940) 115 F. (2d) 385.

p. 179, n. 74. **Administrative Procedure Act.** Under the Administrative Procedure Act, Sec. 10(c), "Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action."

Civil Service Commission. *Wagner v. Mitchell* (D. C. M. D. Pa., 1945) 61 F. Supp. 665.

Federal Power Commission. *Aluminum Co. of America v. Federal Power Commission* (App. D. C., 1942) 130 F. (2d) 445; *Louisville Gas & Electric Co. v. Federal Power Commission* (C. C. A. 6th, 1942) 129 F. (2d) 126, cert. den. 318 U. S. 761, 87 L. Ed. 1133, 63 S. Ct. 559; *East Ohio Gas Co. v. Federal Power Commission* (C. C. A. 6th, 1940) 115 F. (2d) 385.

Interstate Commerce Commission. *John J. Casale, Inc. v. United States* (D. C. D. Del., 1943) 52 F. Supp. 1005. See *McArthur v. United States* (D. C. Ill., 1941) 44 F. Supp. 697 aff'd 315 U. S. 787, 86 L. Ed. 1192, 62 S. Ct. 915.

National Labor Relations Board. *Employees' Protective Ass'n of Norfolk v. National Labor Relations Board* (C. C. A. 4th, 1945) 147 F. (2d) 684; *Madden v. Brotherhood and Union of Transit Employees of Baltimore* (C. C. A. 4th, 1945) 147 F. (2d) 439.

Law Review Article. See note, "Final Orders" (1938) 7 *George Washington L. Rev.* 118.

p. 179, n. 75. *Mississippi Power & Light Co. v. Federal Power Commission* (C. C. A. 5th, 1942) 131 F. (2d) 148; *Guaranty Underwriters, Inc. v. Securities & Exchange Commission* (C. C. A. 5th, 1942) 131 F. (2d) 370.

p. 179, n. 77. *Thompson Products v. National Labor Relations Board* (C. C. A. 6th, 1943) 133 F. (2d) 637; *Wagner v. Mitchell* (D. C. M. D. Pa., 1945) 61 F. Supp. 665.

p. 179, n. 78. *National War Labor Board v. United States Gypsum Co.* (App. D. C., 1944) 145 F. (2d) 97, cert. den. 324 U. S. 856, 89 L. Ed. 1415, 65 S. Ct. 857.

p. 180, n. 84. See *East Ohio Gas Co. v. Federal Power Commission* (C. C. A. 6th, 1940) 115 F. (2d) 385.

§ 201. — Preliminary Orders May Become Definitive.

p. 181, n. 90. See *Madden v. Brotherhood and Union of Transit Employees of Baltimore* (C. C. A. 4th, 1945) 147 F. (2d) 439.

§ 201A. (New) — Final Order May Be Reduced to Preliminary Status.

Conversely, the opportunity to challenge a final administrative order offered by a motion for rehearing may subject the order to such critical administrative review as to reduce it to mere preliminary or procedural status and divest it of those qualities of administrative finality essential for judicial review. See § 245.

§ 202. — Unenforceable Orders.

"Advisory" administrative action is not judicially reviewable. *National War Labor Board v. Montgomery Ward* (App. D. C., 1944) 144 F. (2d) 528, cert. den. 323 U. S. 774, 89 L. Ed. 619, 65 S. Ct. 134.

An administrative order which does not grant or withhold any legal right is merely advisory and not of definitive character so as to be judicially reviewable. *Motor Freight Express v. United States* (D. C. E. D. Pa., 1945) 60 F. Supp. 238. See *Pan American Airways Co. v. Civil Aeronautics Board* (C. C. A. 2d, 1941) 121 F. (2d) 810.

p. 181, n. 91. *May Department Stores v. Brown* (D. C. W. D. Mo. W. D., 1945) 60 F. Supp. 735; *England v. Devine* (D. C. D. Mass., 1945) 59 F. Supp. 379.

§ 203. — Orders Rescinded, Modified, Withdrawn; Rehearing.

p. 182, n. 97. See § 245.

§ 204. — Orders Conferring Bounty or Gratuity.

Under the Renegotiation Act the Tax Court's determination of excessive profits is final and not reviewable both as to questions of fact and questions of law. 50 USC App. 1191 (e)(1). *United States Electrical Motors v. Jones* (App. D. C., 1946) 153 F. (2d) 134.

Subsidy payments to slaughterers under the Emergency Price Control Act of 1942 are not a "bounty or gratuity," and regulations governing them are judicially reviewable. *Illinois Packing Co. v. Snyder* (Em. App., 1945) 151 F. (2d) 337.

p. 182, n. 2. *United States Electrical Motors v. Jones* (App. D. C., 1946) 153 F. (2d) 134; *Nolde & Hoist v. Helvering* (App. D. C., 1941) 122 F. (2d) 41. See *Wilson & Co., Inc. v. United States* (1940) 311 U. S. 104, 85 L. Ed. 71, 61 S. Ct. 120.

When claims created by statute are against the United States, no remedy through the courts need be provided. *Stark v. Wickard* (1944) 321 U. S. 283, 88 L. Ed. 733, 64 S. Ct. 559. See also § 426.

§ 205. "Negative" Order Rule Abolished.

p. 182, n. 4. *Interstate Commerce Commission v. Hoboken Manufacturers' R. Co.*, 320 U. S. 368, 88 L. Ed. 107, 64 S. Ct. 159 (1943); *Mitchell v. United States* (1941) 313 U. S. 80, 85 L. Ed. 1201, 61 S. Ct. 873. See note, "Doctrine of 'Negative Orders' Abolished" (1940) 24 *Minnesota L. Rev.* 379.

III. RIGHT TO REVIEW FINDINGS**§ 206. Findings Reviewable Only Where of Definitive Character.**

The certification of a bargaining agent by the National Labor Relations Board may be subject to judicial review under the general equity jurisdiction of a Federal District Court, § 650 et seq., upon an appropriate showing of injury or damage. See *Inland Empire District Council, L. S. W. U. v. Millis* (1945) 325 U. S. 697, 89 L. Ed. 1877, 65 S. Ct. 1316.

A certification is in substance a finding, together with the statement that the finding was made. See *Inland Empire District Council, L. S. W. U. v. Millis* (1945) 325 U. S. 697, 89 L. Ed. 1877, 65 S. Ct. 1316.

p. 184, n. 11. *El Dorado Oil Works v. United States* (1946) 328 U. S. 12, 90 L. Ed. 1053, 66 S. Ct. 843. See *Inland Empire District Council, L. S. W. U. v. Millis*, (1945) 325 U. S. 697, 89 L. Ed. 1877, 65 S. Ct. 1316.

Administrative Procedure Act. Under the Administrative Procedure Act, Sec. 10(c), "Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review."

p. 184, n. 15. See *Stark v. Wickard* (1944) 321 U. S. 288, 88 L. Ed. 733, 64 S. Ct. 559. But see *Switchmen's Union v. National Mediation Board* (1943) 320 U. S. 297, 88 L. Ed. 61, 64 S. Ct. 95.

IV. RULES AND REGULATIONS**§ 207. In General.**

Whether one who has failed to assert the defect in the tribunal vested with exclusive jurisdiction of the subject matter may defend a charge of criminal violation of an administrative regulation on the ground that the regulation is unconstitutional on its face has been expressly left open. *Yakus v. United States* (1944) 321 U. S. 414, 88 L. Ed. 834, 64 S. Ct. 660. See also § 644A.

When required conformity to regulations causes injury cognizable by a court of equity, they are appropriately the subject of attack under applicable statutory provisions such as the Urgent Deficiencies Act. *Columbia Broadcasting System v. United States* (1942) 316 U. S. 407, 86 L. Ed. 1563, 62 S. Ct. 1194.

However, where judicial review of the validity of a regulation is vested exclusively in a specially constituted tribunal, right to review, even of an alleged constitutional defect, may be forfeited by failure to assert the right before the tribunal having jurisdiction to determine it. **Yakus v. United States* (1944) 321 U. S. 414, 88 L. Ed. 834, 64 S. Ct. 660. See also §§ 626 and 632.

p. 185, n. 19. *Columbia Broadcasting System v. United States* (1942) 316 U. S. 407, 86 L. Ed. 1563, 62 S. Ct. 1194.

Administrative Procedure Act. Under the Administrative Procedure Act, Sec. 10(c), "Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review."

IV-A. (New) OTHER FORMS OF ADMINISTRATIVE ACTION

§ 207A. (New) In General.

Judicial review has been accorded of action of an administrative agency taken in conformity with a "minute" of the agency. *Social Security Board v. Nierotko* (1946) 327 U. S. 358, 90 L. Ed. 718, 66 S. Ct. 637. See also § 65A.

§ 207B. (New) Personal Judgment or Opinion on Discretionary Matters.

Where Congress authorizes a public officer to take some specified legislative action when in his judgment or opinion that action is necessary or appropriate to carry out the policy of Congress, the judgment or opinion of the officer as to the existence of facts calling for that action is not subject to review. *United States v. George S. Bush & Co., Inc.* (1940) 310 U. S. 371, 84 L. Ed. 1259, 60 S. Ct. 944. See *Barr v. United States* (1945) 324 U. S. 83, 89 L. Ed. 765, 65 S. Ct. 522. This rule is to some extent at least bound up with the rule that judicial review may be had only where legal rights have been affected. See § 188 et seq.

To illustrate, where Congress has given to the President the right to change a rate of duty "if in his judgment" the new rate is necessary to equalize differences in costs of production, the judgment of the President that such a change in rate is necessary is no more subject to judicial review than if Congress itself had exercised that judgment. *United States v. George S. Bush & Co., Inc.* (1940) 310 U. S. 371, 84 L. Ed. 1259, 60 S. Ct. 944.

This interesting rule is to be contrasted with the orthodox situation where the administrative agency is empowered, not to pass a personal judgment or opinion in the subjective sense as to the existence of certain facts, but is empowered only to find in the objective sense whether a certain factual standard laid down by Congress exists as a matter of fact in a particular case. In the latter situation findings are of course necessary, see §§ 550-574, and the court will inquire whether the findings are supported by substantial evidence. See § 575 et seq.

But where an official acts solely on grounds which misapprehend the legal rights of the parties, his otherwise unreviewable discretion may become subject to correction by the court. *Arenas v. United States* (1944) 322 U. S. 419, 88 L. Ed. 1363, 64 S. Ct. 1090. See also § 704.

V. MOOT CONTROVERSIES

§ 208. No Right to Judicial Review Where Controversy Is Moot.

p. 185, n. 22. *National Association of Securities Dealers v. Securities & Exchange Commission* (C. C. A. 3rd, 1944) 143 F. (2d) 62; *Spreckels Sugar*

Co. v. Wickard (App. D. C., 1941) 131 F. (2d) 12. See *In re Rocillo* (D. C. E. D. N. Y., 1945) 61 F. Supp. 94.

See note, "‘Moot’ Administrative Orders," (1940) 53 Harv. L. Rev. 628.

See the cases cited in the succeeding sections of this subdivision.

p. 185, n. 23. *Hunter Co. v. McHugh*, 320 U. S. 222, 88 L. Ed. 5, 64 S. Ct. 19 (1943). See *Interstate Commerce Commission v. Hoboken Manufacturers' R. Co.*, 320 U. S. 368, 88 L. Ed. 107, 64 S. Ct. 159 (1943).

§ 209. When Controversy Is Moot.

A suit to enjoin threatened administrative action as a trespass becomes moot when the parties on appeal stipulate that such action will not be taken. *Mine Safety Appliances Co. v. Forrestal* (1945) 326 U. S. 371, 90 L. Ed. 140, 66 S. Ct. 219.

When corporate bonds are redeemed, a case involving extension of trading privileges in the bonds becomes moot. *National Ass'n of Securities Dealers v. Securities & Exchange Commission* (C. C. A. 3rd, 1944) 143 F. (2d) 62.

Where an order of the Securities and Exchange Commission directed a holding company to divest itself of certain interests, and divestment was accomplished and the Commission dismissed its proceedings, the order became moot. *United Gas Improvement Co. v. Securities & Exchange Commission* (C. C. A. 3rd, 1943) 138 F. (2d) 1010.

An order directing the disestablishment of a union became moot when the union was abandoned by its members. *National Labor Relations Board v. Hollywood-Maxwell Co.* (C. C. A. 9th, 1942) 126 F. (2d) 815.

A suit to stay an administrative order pending administrative review becomes moot when the order is affirmed by the appellate agency. *In re Rocillo* (D. C. E. D. N. Y., 1945) 61 F. Supp. 94. See § 45.

p. 186, n. 25. **Alien Cases.** When an administrative agency changes the legal theory of its action, the issue of whether the original theory sustained the action becomes moot. *United States v. Uhl* (C. C. A. 2d, 1944) 144 F. (2d) 286.

Interstate Commerce Commission. See *Royal Cadillac Service v. United States* (1942) 317 U. S. 595, 87 L. Ed. 487, 63 S. Ct. 158.

When action by a Local Selective Service Board is appealed and sustained by the Appeal Board, the Local Board's action is superseded and cannot be considered on judicial review. *United States v. Nichols* (C. C. A. 3rd, 1945) 151 F. (2d) 155. See also § 45.

Price Administrator. *Bowles v. United States* (1943) 319 U. S. 33, 87 L. Ed. 1194, 63 S. Ct. 912; *Fasons Realty Corp. v. Bowles* (Em. App., 1944) 146 F. (2d) 499.

Secretary of Agriculture. *Spreekels Sugar Co. v. Wickard* (App. D. C., 1941) 131 F. (2d) 12.

State Agencies. When an administrative order is superseded pending judicial review, the controversy becomes moot. *Hunter Co. v. McHugh* (1943) 320 U. S. 222, 88 L. Ed. 5, 64 S. Ct. 19.

When an administrative agency by subsequent action removes the ground of complaint, the case becomes moot. *Natural Milk Producers' Ass'n of California v. San Francisco* (1943) 317 U. S. 423, 87 L. Ed. 375, 63 S. Ct. 359.

p. 186, n. 26. *Ickes v. Associated Industries* (1943) 320 U. S. 707, 88 L. Ed. 414, 64 S. Ct. 74; *Spreekels Sugar Co. v. Wickard* (App. D. C., 1941) 131 F. (2d) 12.

A controversy becomes moot when the administrative order attacked expires by its own terms pending judicial review. *Nelson v. B. Simon Hardware Co.*

(App. D. C., 1944) 145 F. (2d) 386; *Brown v. Civil Aeronautics Authority* (C. C. A. 9th, 1941) 119 F. (2d) 172.

§ 210. When Controversy Is Not Moot.

A controversy is not moot if the decision of the court can affect the rights of the litigants in the case before it. *Collins v. Porter* (1946) 328 U. S. 46, 90 L. Ed. 1075, 66 S. Ct. 893.

An appeal by a utility in a controversy over the validity of a state administrative order reducing rates was saved from becoming moot when the utility sold its properties to the city, where the decision of the case was necessary to determine the utility's right to funds subject to the administrative order and impounded under a stay of execution. *Market St. Ry. Co. v. Railroad Commission of State of California* (1945) 324 U. S. 548, 89 L. Ed. 1171, 65 S. Ct. 770.

A controversy does not become moot or abated merely because of the dissolution of the corporate defendant subject to an enforcing injunction. *Walling v. James V. Reuter, Inc.* (1944) 321 U. S. 671, 88 L. Ed. 1001, 64 S. Ct. 826.

A case is not moot because it has no probable future effect, if it controls a rate division for the past, during the pendency of the judicial proceedings. *Interstate Commerce Commission v. Hoboken Manufacturers' R. Co.*, 320 U. S. 368, 88 L. Ed. 107, 64 S. Ct. 159 (1943).

Revocation of a regulation is no defense to a violation occurring before revocation. *O'Neal v. United States* (C. C. A. 6th, 1944) 140 F. (2d) 908, cert. den. 322 U. S. 729, 88 L. Ed. 1565, 64 S. Ct. 945.

In a suit to enjoin proposed administrative action, revocation of a notice of intention to act does not make the question moot, when the agency still intends to take action. *Fox v. Ickes* (App. D. C., 1943) 137 F. (2d) 30, cert. den. 320 U. S. 792, 88 L. Ed. 477, 64 S. Ct. 204.

An attempted settlement of a compensation award does not make moot a suit to enjoin enforcement of the award, where the statute prohibits settlements. *Henderson v. Glens Falls Indemnity Co.* (C. C. A. 5th, 1943) 134 F. (2d) 320, cert. den. 319 U. S. 756, 87 L. Ed. 1709, 63 S. Ct. 1175.

p. 187, n. 34. A controversy involving the validity of an order is not made moot by the filing of a certificate of compliance with the order. *American Chain & Cable Co. v. Federal Trade Commission* (C. C. A. 4th, 1944) 142 F. (2d) 909. See *Okin v. Securities & Exchange Commission* (C. C. A. 2d, 1944) 145 F. (2d) 913.

p. 188, n. 40. *Florida v. Bellman* (C. C. A. 5th, 1945) 149 F. (2d) 890.

§ 211. — Compliance with Administrative Sanction Immaterial.

p. 188, n. 42. *National Labor Relations Board v. Fickett-Brown Mfg. Co.* (C. C. A. 5th, 1944) 140 F. (2d) 883; *National Labor Relations Board v. National Laundry Co.* (App. D. C., 1943) 138 F. (2d) 589; *National Labor Relations Board v. Cleveland-Cliffs Iron Co.* (C. C. A. 6th, 1943) 133 F. (2d) 295; *Indianapolis Power & Light Co. v. National Labor Relations Board* (C. C. A. 7th, 1941) 122 F. (2d) 757, cert. den. 315 U. S. 804, 86 L. Ed. 1204, 62 S. Ct. 633; *National Labor Relations Board v. Oregon Worsteds Co.* (C. C. A. 9th, 1938) 96 F. (2d) 193.

p. 188, n. 43. *National Labor Relations Board v. National Laundry Co.* (App. D. C., 1943) 138 F. (2d) 589.

p. 188, n. 45. *National Labor Relations Board v. Fickett-Brown Mfg. Co.* (C. C. A. 5th, 1944) 140 F. (2d) 883; *National Labor Relations Board v. L. H. Hamel Co.* (C. C. A. 1st, 1943) 135 F. (2d) 71; *National Labor Relations Board v. Oregon Worsted Co.* (C. C. A. 9th, 1938) 96 F. (2d) 193.

§ 212. — Effect of Changed Conditions.

p. 189, n. 48. *Indianapolis Power & Light Co. v. National Labor Relations Board* (C. C. A. 7th, 1941) 122 F. (2d) 757, cert. den. 315 U. S. 804, 86 L. Ed. 1204, 62 S. Ct. 633; *National Labor Relations Board v. Blanton Co.* (C. C. A. 8th, 1941) 121 F. (2d) 564.

p. 189, n. 50. *National Labor Relations Board v. Westinghouse Air Brake Co.* (C. C. A. 3rd, 1941) 120 F. (2d) 1004.

PART II

PREREQUISITE TO JUDICIAL RELIEF—EXHAUSTION OF ADMINISTRATIVE REMEDIES

CHAPTER 15

PRIMARY JURISDICTION

I. RESPECTING ADMINISTRATIVE QUESTIONS

§ 214. The Primary Jurisdiction Doctrine.

The primary jurisdiction doctrine has been applied in intergovernmental relations, as when the power of a state agency to order an extension of service was held to depend upon the issuance by the Federal Power Commission of a certificate of public convenience and necessity under the Natural Gas Act. *Illinois Natural Gas Co. v. Central Illinois Public Service Co.* (1942) 314 U. S. 498, 86 L. Ed. 371, 62 S. Ct. 384.

The rule of primary jurisdiction has been held not to require compliance with state administrative procedure before seeking a license from the Federal Power Commission under the Federal Power Act, 16 USC 802(b). *First Iowa Hydro-Electric Cooperative v. Federal Power Commission* (1946) 328 U. S. 152, 90 L. Ed. 1143, 66 S. Ct. 906.

p. 191, n. 3. See also the cases cited in §§ 216 and 217.

Civil Aeronautics Board. * *Adler v. Chicago & Southern Air Lines, Inc.* (D. C. E. D. Mo. E. D., 1941) 41 F. Supp. 366.

Federal Communications Commission. *Radio Station WOW, Inc. v. Johnson* (1945) 326 U. S. 120, 89 L. Ed. 2092, 65 S. Ct. 1475; *Ambassador, Inc. v. United States* (1945) 325 U. S. 317, 89 L. Ed. 1637, 65 S. Ct. 1151.

Federal Trade Commission. *Jacob Siegel Co. v. Federal Trade Commission* (1946) 327 U. S. 608, 90 L. Ed. 888, 66 S. Ct. 758; *Miles Laboratories v. Federal Trade Commission* (App. D. C., 1944) 140 F. (2d) 683, cert. den. 322 U. S. 752, 83 L. Ed. 1582, 64 S. Ct. 1263. See *United States Alkali Export Ass'n, Inc. v. United States* (1945) 325 U. S. 196, 89 L. Ed. 1554, 65 S. Ct. 1120.

Interstate Commerce Commission. *Smith v. Hoboken Railroad, Warehouse & Steamship Connecting Co.* (1946) 328 U. S. 123, 90 L. Ed. 1123, 66 S. Ct. 947; *Thompson v. Texas Mexican Ry. Co.* (1946) 328 U. S. 134, 90 L. Ed. 1132, 66 S. Ct. 937; * *State of Georgia v. Pennsylvania R. Co.* (1945) 324 U. S. 439, 89 L. Ed. 1051, 65 S. Ct. 716; *Illinois Commerce Commission v. Thomson* (1943) 318 U. S. 675, 87 L. Ed. 1075, 63 S. Ct. 834; *Armour & Co. v. Alton R. Co.* (1941) 312 U. S. 195, 85 L. Ed. 771, 61 S. Ct. 498; *Henderson v. United States* (D. C. D. Md., 1945) 63 F. Supp. 906; *In re Missouri Pac. R. Co.* (D. C. E. D. Mo., E. D., 1943) 50 F. Supp. 936.

National Labor Relations Board. *National Labor Relations Board v. Cheney California Lumber Co.* (1946) 327 U. S. 385, 90 L. Ed. 739, 66 S. Ct. 553.

National Railway Adjustment Board. See *Washington Terminal Co. v. Boswell* (App. D. C., 1941) 124 F. (2d) 235, aff'd 319 U. S. 732, 87 L. Ed. 1694, 63 S. Ct. 1430.

Price Administrator. *Yakus v. United States* (1944) 321 U. S. 414, 88 L. Ed. 834, 64 S. Ct. 660; *Machen v. Bowles* (Em. App., 1943) 139 F. (2d) 359. See *R. E. Schanzer, Inc. v. Bowles* (Em. App., 1944) 141 F. (2d) 262.

Secretary of Agriculture. * *La Verne Co-operative Citrus Ass'n v. United States* (C. C. A. 9th, 1944) 143 F. (2d) 415.

Secretary of Labor. *Endicott Johnson Corp. v. Perkins* (1943) 317 U. S. 501, 87 L. Ed. 424, 63 S. Ct. 339.

Selective Service Boards. See *United States v. Di Lorenzo* (D. C. Del., 1942) 45 F. Supp. 590.

State Agencies. *Arkansas Corporation Commission v. Thompson* (1941) 313 U. S. 132, 85 L. Ed. 1244, 61 S. Ct. 888.

Tax Court. *Wade v. Stimson* (D. C. D. C., 1946) 65 F. Supp. 277.

United States Maritime Commission. *Roberto Hernandez, Inc. v. Arnold Bernstein, etc.* (C. C. A. 2d, 1941) 116 F. (2d) 849, cert. den. 313 U. S. 582, 85 L. Ed. 1539, 61 S. Ct. 1101; *Holt Motor Co. v. Nicholson Universal S. S. Co.* (D. C. D. Minn., 1944) 56 F. Supp. 585. See *Macauley v. Waterman Steamship Corp.* (1946) 327 U. S. 540, 90 L. Ed. 839, 66 S. Ct. 712.

p. 193, n. 7. * *Steele v. Louisville & N. R. Co.* (1944) 323 U. S. 192, 89 L. Ed. 173, 65 S. Ct. 226; *Tunstall v. Brotherhood of Locomotive Firemen and Enginemen, Ocean Lodge No. 76* (1944) 323 U. S. 210, 89 L. Ed. 187, 65 S. Ct. 235.

For instance, a state may sue under the original jurisdiction of the Supreme Court to enjoin an alleged rate-making conspiracy in violation of the anti-trust laws where the relief sought does not include the determination of an administrative question, such as the actual fixing of rates. *State of Georgia v. Pennsylvania R. Co.* (1945) 324 U. S. 439, 89 L. Ed. 1051, 65 S. Ct. 716. See § 506.

See *State Farm Mutual Automobile Ins. Co. v. Duel* (1945) 324 U. S. 154, 89 L. Ed. 812, 65 S. Ct. 573; *Varney v. Warehime* (C. C. A. 6th, 1945) 147 F. (2d) 238, cert. den. 325 U. S. 882, 89 L. Ed. 1997, 65 S. Ct. 1575; and see § 704.

§ 215. Bases of the Doctrine.

p. 194, n. 10. *Thompson v. Texas Mexican Ry. Co.* (1946) 328 U. S. 134, 90 L. Ed. 1132, 66 S. Ct. 937; *United States v. Di Lorenzo* (D. C. Del., 1942) 45 F. Supp. 590.

p. 195, n. 11. *Jacob Siegel Co. v. Federal Trade Commission*, 327 U. S. 608, 90 L. Ed. 888, 66 S. Ct. 758 (1946).

§ 216. Rule Applies Regardless of Form of Judicial Relief Sought.

The doctrine also applies to suits for a declaratory judgment. *Macauley v. Waterman Steamship Corp.* (1946) 327 U. S. 540, 90 L. Ed. 839, 66 S. Ct. 712.

The rule applies also to suits for enforcement of administrative subpoenas. *Endicott Johnson Corp. v. Perkins* (1943) 317 U. S. 501, 87 L. Ed. 424, 63 S. Ct. 339.

The reasonableness of a regulation promulgated by a public utility pursuant to order of the Federal Communications Commission pre-

sents an administrative question and may be assailed only before the Commission, not the courts. *Ambassador, Inc. v. United States* (1945) 325 U. S. 317, 89 L. Ed. 1637, 65 S. Ct. 1151.

p. 197, n. 17. *Thompson v. Texas Mexican Ry. Co.* (1946) 328 U. S. 134, 90 L. Ed. 1132, 66 S. Ct. 937.

p. 197, n. 21. See also § 214.

Federal Communications Commission. *Ambassador, Inc. v. United States*, 325 U. S. 317, 89 L. Ed. 1637, 65 S. Ct. 1151.

National Mediation Board. But see Mr. Justice Rutledge dissenting in *Order of Railway Conductors of America v. Pitney* (1946) 326 U. S. 561, 90 L. Ed. 318, 66 S. Ct. 322.

United States Maritime Commission. See *Macauley v. Waterman Steamship Corp.* (1946) 327 U. S. 540, 90 L. Ed. 839, 66 S. Ct. 712.

p. 198, n. 27. *Bagley v. Vice* (C. C. A. 9th, 1945) 151 F. (2d) 700.

p. 198, n. 28. *Ambassador, Inc. v. United States* (1945) 325 U. S. 317, 89 L. Ed. 1637, 65 S. Ct. 1151; *Arkansas Corporation Commission v. Thompson* (1941) 313 U. S. 132, 85 L. Ed. 1244, 61 S. Ct. 888.

The primary jurisdiction doctrine also applies to bankruptcy reorganization proceedings, *Order of Railway Conductors of America v. Pitney* (1946) 326 U. S. 561, 90 L. Ed. 318, 66 S. Ct. 322, and to an action for wages under the Fair Labor Standards Act. *Addison v. Holly Hill Fruit Products* (1944) 322 U. S. 607, 88 L. Ed. 1488, 64 S. Ct. 1215.

§ 217. — Dismissal or Holding Suit in Abeyance.

Execution of the decree of a state court which directed a transfer of the physical facilities of a radio station, and "to do all things necessary" to secure the return of the license, because of its necessary impact on the jurisdiction of the Federal Communications Commission to determine the administrative question as to who should be entitled to the station license, was stayed pending the determination of applications to the Commission for the license. *Radio Station WOW, Inc. v. Johnson* (1945) 326 U. S. 120, 89 L. Ed. 2092, 65 S. Ct. 1475.

Where, in a suit between private parties, the court holds an administrative regulation invalid, it should hold the suit in abeyance pending the promulgation of a new regulation by the agency. *Addison v. Holly Hill Fruit Products* (1944) 322 U. S. 607, 88 L. Ed. 1488, 64 S. Ct. 1215.

p. 198, n. 32. **Administrator of Wage and Hour Division.** *Addison v. Holly Hill Fruit Products* (1944) 322 U. S. 607, 88 L. Ed. 1488, 64 S. Ct. 1215.

Federal Communications Commission. *Radio Station WOW, Inc. v. Johnson* (1945) 326 U. S. 120, 89 L. Ed. 2092, 65 S. Ct. 1475.

Interstate Commerce Commission. *Thompson v. Texas Mexican Ry. Co.* (1946) 328 U. S. 134, 90 L. Ed. 1132, 66 S. Ct. 937.

National Mediation Board. *Order of Railway Conductors of America v. Pitney* (1946) 326 U. S. 561, 90 L. Ed. 318, 66 S. Ct. 322.

Securities and Exchange Commission. *Securities and Exchange Commission v. Chenery Corp.* (1943) 318 U. S. 80, 87 L. Ed. 626, 63 S. Ct. 454.

II. RESPECTING JUDICIAL QUESTIONS

§ 219. Primary Jurisdiction Traditionally in the Courts. Procedural Commitment to Agency.

Under the Emergency Price Control Act of 1942 the validity of a regulation promulgated by the Price Administrator cannot be judi-

cially considered unless and until it has been assailed before the agency through the prescribed administrative remedy of protest. *Yakus v. United States* (1944) 321 U. S. 414, 88 L. Ed. 834, 64 S. Ct. 660. However, the question whether the prescribed administrative remedy must be exhausted before the regulation can be assailed on the ground that it is unconstitutional on its face has been expressly left open. *Yakus v. United States* (1944) 321 U. S. 404, 88 L. Ed. 834, 64 S. Ct. 660.

Under the Fair Labor Standards Act Congress has authorized the Wage and Hour Administrator, rather than the District Courts, to determine in the first instance the question of coverage by the Act in a preliminary investigation of possibly existing violations. Such provisions do not violate the Fourth or Fifth Amendment. *Oklahoma Press Pub. Co. v. Walling* (1946) 327 U. S. 186, 90 L. Ed. 614, 66 S. Ct. 494.

The fact that an agency fails to make a finding on the question of its own jurisdiction does not preclude the reviewing court from making that determination initially. *City of Yonkers v. United States* (1944) 320 U. S. 685, 88 L. Ed. 400, 64 S. Ct. 327. However, where this judicial question has been in effect impliedly committed for initial decision by an agency, an order of the agency may be invalidated for lack of requisite findings on the judicial question. *City of Yonkers v. United States* (1944) 320 U. S. 685, 88 L. Ed. 400, 64 S. Ct. 327. See also § 550 et seq.

For the effect of statutes providing that objections not raised before the administrative agency may not be considered on judicial review, see § 239.

Where the agency fails to consider the question of its jurisdiction, findings supporting such jurisdiction made by the District Court reviewing the agency's order cannot operate as a substitute. *City of Yonkers v. United States* (1944) 320 U. S. 685, 88 L. Ed. 400, 64 S. Ct. 327.

p. 200, n. 41. **Administrator of the Wage and Hour Division.** *Oklahoma Press Pub. Co. v. Walling* (1946) 327 U. S. 186, 90 L. Ed. 614, 66 S. Ct. 494.

Alien Cases. *West Indian Co. v. Root* (C. C. A. 3rd, 1945) 151 F. (2d) 493.

Federal Trade Commission. *Miles Laboratories v. Federal Trade Commission* (App. D. C., 1944) 140 F. (2d) 683, cert. den. 322 U. S. 752, 88 L. Ed. 1582, 64 S. Ct. 1263; *Aron v. Federal Trade Commission* (D. C. E. D. Pa., 1943) 50 F. Supp. 289.

Interstate Commerce Commission. * *City of Yonkers v. United States* (1944) 320 U. S. 685, 88 L. Ed. 400, 64 S. Ct. 327.

A suit for specific performance of a contract may be initially heard by a court where the contract is one which must be approved by an administrative agency and has been so approved. *Watson Bros. Transp. Co. v. Jaffa* (C. C. A. 8th, 1944) 143 F. (2d) 340.

National Labor Relations Board. *Florida v. Bellman* (C. C. A. 5th, 1945) 149 F. (2d) 890; *National Labor Relations Board v. Northern Trust Co.* (C. C. A. 7th, 1945) 148 F. (2d) 24, cert. den. 326 U. S. 731, 90 L. Ed. 435, 66 S. Ct. 38, 39; *Thompson Products, Inc. v. National Labor Relations Board* (C. C. A. 6th, 1943) 133 F. (2d) 637; *Oregon Shipbuilding Corp. v. National Labor Relations Board* (D. C. D. Oregon, 1943) 49 F. Supp. 386.

Price Administrator. * *Yakus v. United States* (1944) 321 U. S. 414, 88 L. Ed. 834, 64 S. Ct. 660; *Lockerty v. Phillips* (1943) 319 U. S. 182, 87 L. Ed. 1339, 63 S. Ct. 1019; *Brown v. Lee* (D. C. S. D. Cal., S. D., 1943) 51 F. Supp. 85.

Secretary of Agriculture. A defendant in a suit to enjoin violation of an administrative order is in the same position as a plaintiff in a suit to set aside the order and he is as fully bound by this rule in the one case as in the other. * *LaVerne Cooperative Citrus Ass'n v. United States* (C. C. A. 9th, 1944) 143 F. (2d) 415.

Secretary of Labor. *Endicott Johnson Corp. v. Perkins* (1943) 317 U. S. 501, 87 L. Ed. 424, 63 S. Ct. 339.

United States Employees' Compensation Commission. *White v. Tennessee Valley Authority* (D. C. E. D. Tenn., S. Div, 1945) 58 F. Supp. 776.

United States Maritime Commission. See *Macauley v. Waterman Steamship Corp.* (1946) 327 U. S. 540, 90 L. Ed. 839, 66 S. Ct. 712.

p. 201, n. 42. *City of Yonkers v. United States* (1944) 320 U. S. 685, 88 L. Ed. 400, 64 S. Ct. 327.

p. 202, n. 44. An administrative agency may not be enjoined from holding a hearing on the ground that it had no jurisdiction, prior to an initial decision of that question by the agency. *Thompson Products, Inc. v. National Labor Relations Board* (C. C. A. 6th, 1943) 133 F. (2d) 637. This rule is not affected by the fact that the party seeking to enjoin the hearing is a state. *Florida v. Bellman* (C. C. A. 5th, 1945) 149 F. (2d) 890.

Neither the primary jurisdiction doctrine nor the rule requiring exhaustion of administrative remedies applies where the alleged lack of jurisdiction is not based on administrative questions, that is, facts delegated to an agency for determination. *Varney v. Warehime* (C. C. A. 6th, 1945) 147 F. (2d) 238, cert. den. 325 U. S. 882, 89 L. Ed. 1997, 65 S. Ct. 1575. See also §§ 214 and 704.

§ 220. Practical Basis of Rule Requiring Initial Administrative Decision of Certain Judicial Questions.

The insistence that the agency make initial decisions of judicial questions committed by implication to the agency for that purpose gives added assurance that the interests which Congress sought to protect will be safe-guarded, and it also gives the reviewing courts the assistance of an expert judgment on a knotty phase of a technical subject. *City of Yonkers v. United States* (1944) 320 U. S. 685, 88 L. Ed. 400, 64 S. Ct. 327.

Again, where the judicial question of the agency's jurisdiction depended on the mixed question of fact and law, see § 430, whether an electrified intrastate branch line was "operated as a part of a general steam railway system," on which issue the agency had made neither findings nor references, the fact that the lower court reviewing the order had found independently in favor of the agency's jurisdiction did not absolve the agency from the necessity of making its own administrative determination of this judicial question. * *City of Yonkers v. United States* (1944) 320 U. S. 685, 88 L. Ed. 400, 64 S. Ct. 327.

The primary jurisdiction doctrine also prevents an employer from raising the question whether it is involved in interstate commerce, as a defense to a petition for enforcement of a Labor Board subpoena, before the Board has begun its proceedings. *National Labor Relations Board v. Northern Trust Co.* (C. C. A. 7th, 1945) 148 F. (2d) 24, cert. den. 326 U. S. 731, 90 L. Ed. 435, 66 S. Ct. 38, 39.

p. 203, n. 49. See *Walling v. La Belle Steamship Co.* (C. C. A. 6th, 1945) 148 F. (2d) 198.

p. 204, n. 51. *Macauley v. Waterman Steamship Corp.*, 327 U. S. 540, 90 L. Ed. 839, 66 S. Ct. 712 (1946); *Miles Laboratories v. Federal Trade Commission* (App. D. C., 1944) 140 F. (2d) 683, cert. den. 322 U. S. 752, 88 L. Ed. 1582, 64 S. Ct. 1263.

§ 221. Irreparable Injury Immaterial.

p. 204, n. 52. *Miles Laboratories v. Federal Trade Commission* (App. D. C., 1944) 140 F. (2d) 683, cert. den. 322 U. S. 752, 88 L. Ed. 1582, 64 S. Ct. 1263.

§ 223. Declaratory Judgment Act Does Not Mitigate Force of Rule.

p. 205, n. 56. *Macauley v. Waterman Steamship Corp.* (1946) 327 U. S. 540, 90 L. Ed. 839, 66 S. Ct. 712. See also § 707.

§ 224. Judicial Questions Which Have Been Exclusively Committed for Initial Administrative Decision.

Other judicial questions held to have been committed to administrative agencies for initial decision include whether a contract made with the British Ministry of War Transport is covered by the Renegotiation Act. *Macauley v. Waterman Steamship Corp.* (1946) 327 U. S. 540, 90 L. Ed. 839, 66 S. Ct. 712.

The question of which of a contractor's plants are covered by the Walsh-Healey Act has been held to be exclusively committed to the Secretary of Labor for initial decision. *Endicott Johnson Corp. v. Perkins* (1943) 317 U. S. 501, 87 L. Ed. 424, 63 S. Ct. 339.

p. 205, n. 57. *National Labor Relations Board v. Northern Trust Co.* (C. C. A. 7th, 1945) 148 F. (2d) 24, cert. den. 326 U. S. 731, 90 L. Ed. 435, 66 S. Ct. 38, 39.

§ 224A. (New) Rule May Be Invoked by Contractual Provision.

Where a contract with the United States provides for initial administrative decision on disputes arising out of it, failure to use the administrative procedure prescribed precludes the bringing of suit in the Court of Claims. *United States v. Joseph A. Holpuch Co.* (1946) 328 U. S. 234, 90 L. Ed. 1192, 66 S. Ct. 1000.

§ 225. Limitation of Rule.

Where an administrative agency has authority merely to investigate and recommend, but no power to enforce its findings, the agency does not have primary jurisdiction of the subject matter so as to preclude judicial action before the agency has acted. *United States Alkali Export Ass'n, Inc. v. United States*, 325 U. S. 196, 89 L. Ed. 1554, 65 S. Ct. 1120. See § 227.

p. 206, n. 63. See *Varney v. Warehime* (C. C. A. 6th, 1945) 147 F. (2d) 238, cert. den. 325 U. S. 882, 89 L. Ed. 1997, 65 S. Ct. 1575.

CHAPTER 16

EXHAUSTION OF ADMINISTRATIVE REMEDIES

§ 226. Introduction.

p. 208, n. 1. See *Macauley v. Waterman Steamship Corp.*, 327 U. S. 540, 90 L. Ed. 839, 66 S. Ct. 712 (1946). See also § 45 et seq.

§ 226A. (New) Relationship of Procedural Due Process and Exhaustion of Administrative Remedies.

Where there are inherent constitutional defects in a prescribed administrative scheme, or the prescribed administrative procedure is in-

capable of affording due process, the administrative remedy need not be exhausted before judicial relief is sought. See § 38. But all administrative remedies which afford due process must be exhausted before judicial review is sought. This is the orthodox rule respecting administrative questions, see § 214 et seq., and also with respect to judicial questions impliedly delegated to an agency for initial decision. See § 219 et seq.

I. RESPECTING ADMINISTRATIVE QUESTIONS

§ 227. In General.

The rule of exhaustion of administrative remedies does not apply to advisory administrative agencies. Thus the pendency of a case before the National War Labor Board does not bar a suit in the courts. *Oil Workers International Union, Local 463 v. Texoma Natural Gas Co.* (C. C. A. 5th, 1944) 146 F. (2d) 62, cert. den. 324 U. S. 872, 89 L. Ed. 1426, 65 S. Ct. 1017. See § 225.

The rule of exhaustion of administrative remedies applies even where the constitutionality of the act prescribing the remedies is undecided. *Aircraft & Diesel Equipment Corp. v. Hirsch* (D. C. D. C., 1945) 62 F. Supp. 520.

p. 209, n. 4. With respect to legislative or administrative review in general, see § 45 et seq.

Federal Alcohol Administration. *Levers v. Anderson* (1945) 326 U. S. 219, 90 L. Ed. 26, 66 S. Ct. 72.

Federal Trade Commission. See *United States Alkali Export Ass'n, Inc. v. United States* (1945) 325 U. S. 196, 89 L. Ed. 1554, 65 S. Ct. 1120.

Interstate Commerce Commission. See *United States v. Wabash R. Co.* (1944) 322 U. S. 198, 88 L. Ed. 1225, 64 S. Ct. 974.

National Labor Relations Board. *Madden v. Brotherhood and Union of Transit Employees of Baltimore* (C. C. A. 4th, 1945) 147 F. (2d) 439; *Inland Empire District Council v. National Labor Relations Board* (D. C. D. C., 1943) 62 F. Supp. 207.

Price Administrator. *Village Apartment Homes v. Bowles* (Em. App., 1945) 149 F. (2d) 649; **Baldwin v. Bowles* (D. C. W. D. So. Car., 1944) 57 F. Supp. 637.

Secretary of the Treasury. *Hartman v. Federal Reserve Bank of Philadelphia* (D. C. E. D. Penn., 1944) 55 F. Supp. 801.

Secretary of War. *Wade v. Stimson* (D. C. D. C., 1946) 65 F. Supp. 277.

Tax Court. *Aircraft & Diesel Equipment Corp. v. Hirsch* (D. C. D. C., 1945) 62 F. Supp. 520.

Law Review Article. See note, "Exhausting Administrative Remedies—Injunctions" (1938) 7 *George Washington L. Rev.* 116.

p. 209, n. 5. *Hammond v. Hull* (App. D. C., 1942) 131 F. (2d) 23, cert. den. 318 U. S. 777, 87 L. Ed. 1145, 63 S. Ct. 830; *Citizens Protective League v. Byrnes* (D. C. D. C., 1946) 64 F. Supp. 233.

p. 209, n. 6. See § 708.

Alien Cases. *United States v. Uhl* (C. C. A. 2d, 1944) 144 F. (2d) 286.

Selective Service Boards. *Estep v. United States* (1946) 327 U. S. 114, 90 L. Ed. 567, 66 S. Ct. 423; *Benesch v. Underwood* (C. C. A. 6th, 1942) 132 F. (2d) 430; *In re Flesch* (D. C. D. Mont., 1945) 63 F. Supp. 978; *Bridges v. Thomas* (D. C. Colo., 1944) 62 F. Supp. 828; *United States ex rel. Rakir v. Magruder* (D. C. D. R. I., 1944) 55 F. Supp. 947.

Law Review Article. See B. F. Lindsley, "The Necessity For Exhausting Administrative Remedies—Its Consequences in Judicial Review of Selective Service Cases" (1944) 32 *Georgetown L. J.* 385.

p. 210, n. 7. See *Moir v. United States* (C. C. A. 1st, 1945) 149 F. (2d) 455.

p. 210, n. 8. **Cross-reference.** The invalidity of an administrative order or determination may not be asserted as a defense to a criminal prosecution unless prescribed administrative remedies have been exhausted. See § 247A.

Civil Aeronautics Board. Braniff Airways v. Civil Aeronautics Board (App. D. C., 1945) 147 F. (2d) 152.

Commissioner of Internal Revenue. Caldwell Sugars, Inc. v. United States (Ct. Claims, 1944) 54 F. Supp. 544.

Federal Alcohol Administration. Strauss v. Berkshire (C. C. A. 8th, 1942) 132 F. (2d) 530; Leebern v. United States (C. C. A. 5th, 1941) 124 F. (2d) 505; Peoria Braumeister Co. v. Yellowley (C. C. A. 7th, 1941) 123 F. (2d) 637.

Price Administrator. Fasons Realty Corp. v. Bowles (Em. App., 1944) 146 F. (2d) 499.

Secretary of Agriculture. Defenses and counterclaims in a suit for a mandatory injunction to compel compliance with an administrative order will be dismissed where administrative remedies have not been exhausted. United States v. Hogansburg Milk Co. (D. C. N. D. N. Y., 1944) 57 F. Supp. 297; United States v. Wood (D. C. D. Mass., 1945) 61 F. Supp. 175.

Selective Service Boards. Rase v. United States (C. C. A. 6th, 1942) 129 F. (2d) 204; Johnson v. United States (C. C. A. 8th, 1942) 126 F. (2d) 242; United States v. Kirschenman (D. C. D. S. D., 1946) 65 F. Supp. 153.

§ 228. Examples of Rule.

p. 210, n. 13. United States v. Uhl (C. C. A. 2d, 1944) 144 F. (2d) 286.

p. 211, n. 15. Fasons Realty Corp. v. Bowles (Em. App., 1944) 146 F. (2d) 499; Leebern v. United States (C. C. A. 5th, 1941) 124 F. (2d) 505.

§ 230. Rule Stricter Respecting State Administrative Remedies.

p. 213, n. 29. Illinois Commerce Commission v. Thomson (1943) 318 U. S. 675, 87 L. Ed. 1075, 63 S. Ct. 834. See Public Utilities Commission of Ohio v. United Fuel Gas Co. (1943) 317 U. S. 456, 87 L. Ed. 396, 63 S. Ct. 369.

§ 231. Rule Inapplicable to State Judicial Remedies.

p. 214, n. 32. Hall v. Nagle (C. C. A. 5th, 1946) 154 F. (2d) 931; Mitchell v. Wright (C. C. A. 5th, 1946) 154 F. (2d) 924.

p. 214, n. 34. Railroad Commission of Texas v. Pullman Co. (1941) 312 U. S. 496, 85 L. Ed. 971, 61 S. Ct. 643.

§ 236A. (New) Agency May Not Interrupt Right to Pursue Administrative Remedies.

A party has a right to pursue his administrative remedies uninterruptedly to the end. Chih Chung Tung v. United States (C. C. A. 1st, 1944) 142 F. (2d) 919.

II. RESPECTING JUDICIAL QUESTIONS

A. By Complaining Party

§ 238. In General.

The reviewing court has passed on questions not urged before the Tax Court where an intervening Supreme Court case has clarified the law on those questions. Commissioner of Internal Revenue v. Phillips' Estate (C. C. A. 5th, 1942) 126 F. (2d) 851; Commissioner of Internal Revenue v. Kempner (C. C. A. 5th, 1942) 126 F. (2d) 853; Commissioner of Internal Revenue v. Chamberlain (C. C. A. 2d, 1941) 121 F. (2d) 765.

The court on judicial review may decide an issue not presented to the Board of Tax Appeals where it is purely an issue of law not requiring new or amplified factual determinations. *Black Motor Co. v. Commissioner of Internal Revenue* (C. C. A. 6th, 1942) 125 F. (2d) 977.

The Court may reverse the Board of Tax Appeals because of an error not called to the Board's attention if otherwise a miscarriage of justice would occur. *Lumaghi Coal Co. v. Helvering* (C. C. A. 8th, 1942) 124 F. (2d) 645; *Helvering v. Rubinstein* (C. C. A. 8th, 1942) 124 F. (2d) 969.

p. 220, n. 73. *Price Administrator. Gold-Form, Inc. v. Bowles* (Em. App., 1945) 152 F. (2d) 107; *Veillette v. Bowles* (Em. App., 1945) 150 F. (2d) 862; *Machen v. Bowles* (Em. App., 1943) 139 F. (2d) 359.

Secretary of Agriculture. Nichols & Co. v. Secretary of Agriculture (C. C. A. 1st, 1942) 131 F. (2d) 651.

Tax Court. Where a new legal theory has been advanced, so that the administrative agency neither found the facts nor considered the applicability of the statute in the light thereof, there should be a remand to the agency, with directions to consider evidence under the new theory. *Hormel v. Helvering* (1941) 312 U. S. 552, 85 L. Ed. 1037, 61 S. Ct. 719.

p. 221, n. 75. In cases before the Tax Court the Commissioner of Internal Revenue is substantially in the position of the party seeking affirmative relief, and accordingly theories of recovery not raised by the Commissioner or passed on by the Tax Court cannot be considered on judicial review.

Tax Court. * *Hormel v. Helvering* (1941) 312 U. S. 552, 85 L. Ed. 1037, 61 S. Ct. 719; *Lloyd's Estate v. Commissioner of Internal Revenue* (C. C. A. 3rd, 1944) 141 F. (2d) 758; *Commissioner of Internal Revenue v. Fortney Oil Co.* (C. C. A. 6th, 1942) 125 F. (2d) 995. But see *Commissioner of Internal Revenue v. Hopkinson* (C. C. A. 2d, 1942) 126 F. (2d) 406 and *Commissioner of Internal Revenue v. Montague* (C. C. A. 6th, 1942) 126 F. (2d) 948.

B. By Defending Party

§ 239. In General: Statutory Requirement.

As in Section 10(e) of the National Labor Relations Act, 29 USC 160(e), Congress placed a limitation upon the power of courts to review orders of certain administrative agencies by providing that "No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." See *National Labor Relations Board v. Cowell Portland Cement Co.* (C. C. A. 9th, 1945) 148 F. (2d) 237, cert. den. 326 U. S. 735, 90 L. Ed. 438, 66 S. Ct. 44. By such a provision, Congress said in effect that in a proceeding for enforcement of the agency's order the court is to render judgment on consent as to all issues that were contestable before the agency but were in fact not contested.

National Labor Relations Board. * *National Labor Relations Board v. Cheney California Lumber Co.* (1946) 327 U. S. 385, 90 L. Ed. 739, 66 S. Ct. 553; *National Labor Relations Board v. Illinois Tool Works* (C. C. A. 7th, 1946) 153 F. (2d) 811; *National Labor Relations*

Board v. Cowell Portland Cement Co. (C. C. A. 9th, 1945) 148 F. (2d) 237, cert. den. 326 U. S. 735, 90 L. Ed. 438, 66 S. Ct. 44; National Labor Relations Board v. J. G. Boswell Co. (C. C. A. 9th, 1943) 136 F. (2d) 585; National Labor Relations Board v. National Mineral Co. (C. C. A. 7th, 1943) 134 F. (2d) 424, cert. den. 320 U. S. 753, 88 L. Ed. 448, 64 S. Ct. 58; National Labor Relations Board v. Baldwin Locomotive Works (C. C. A. 3rd, 1942) 128 F. (2d) 39; National Labor Relations Board v. Newberry Lumber & Chemical Co. (C. C. A. 6th, 1941) 123 F. (2d) 831.

Price Administrator. See *Gold-Form, Inc. v. Bowles* (Em. App., 1945) 152 F. (2d) 107.

This rule also applies to constitutional questions, even though the agency has no power to rule on the constitutionality of statutes. *Todd v. Securities & Exchange Commission* (C. C. A. 6th, 1943) 137 F. (2d) 475; *Pacific Gas & Electric Co. v. Securities & Exchange Commission* (C. C. A. 9th, 1942) 127 F. (2d) 378. See § 155A.

A general exception to all the recommendations of the trial examiner is not sufficient to satisfy the requirement that objection must be made to the agency in order to be considered on judicial review. *National Labor Relations Board v. Kinner Motors* (C. C. A. 9th, 1946) 154 F. (2d) 1007.

Even in the absence of statute courts may refuse to consider appropriate judicial questions not raised in prior administrative proceedings by defending parties. *West Indian Co. v. Root* (C. C. A. 3rd, 1945) 151 F. (2d) 493; *Athens Roller Mills, Inc. v. Commissioner of Internal Revenue* (C. C. A. 6th, 1943) 136 F. (2d) 125; *Bank of California National Ass'n v. Commissioner of Internal Revenue* (C. C. A. 9th, 1943) 133 F. (2d) 428; *Roerich v. Helvering* (App. D. C., 1940) 115 F. (2d) 39, cert. den. 312 U. S. 700, 85 L. Ed. 1134, 61 S. Ct. 740. See also § 238. This rule should only be cast aside when necessary to prevent a miscarriage of justice. *Athens Roller Mills, Inc. v. Commissioner of Internal Revenue* (C. C. A. 6th, 1943) 136 F. (2d) 125.

If a legal argument is made before the agency, it may be the basis for the decision on judicial review, even though the agency did not consider it or base its decision upon it. *Commissioner of Internal Revenue v. Stimson Mills Co.* (C. C. A. 9th, 1943) 137 F. (2d) 286.

§ 240. Constitutional Questions.

Where a statute sets up a scheme of administrative remedies followed by judicial review, construed as prescribing an exclusive method for determining the validity of orders, a defendant will not be allowed to assert the unconstitutionality of an order without first exhausting the prescribed administrative remedies on that question. **LaVerne Co-operative Citrus Ass'n v. United States* (C. C. A. 9th, 1944) 143 F. (2d) 415.

p. 223, n. 86. However, it has been held that where a statute provides that on judicial review no objection to the order of the agency may be made unless such objection shall have been urged before the Commission, the reviewing court may not pass on the constitutionality of the statute even though the agency had no power to do so. See § 239.

p. 223, n. 88. See *Illinois Natural Gas Co. v. Central Illinois Public Service Co.* (1942) 314 U. S. 498, 86 L. Ed. 371, 62 S. Ct. 384.

§ 241. Estoppel Not Favored.

The mere acceptance of a license could not later bar the objection of unconstitutional conditions, even when accompanied by a specific agreement to abide by the statute and license. *United States v. Appalachian Electric Power Co.* (1940) 311 U. S. 377, 85 L. Ed. 243, 61 S. Ct. 291, rehearing den. 312 U. S. 712, 85 L. Ed. 1143, 61 S. Ct. 548.

p. 224, n. 94. *Commissioner of Internal Revenue v. American Light & Traction Co.* (C. C. A. 7th, 1942) 125 F. (2d) 365.

III. WHEN ADMINISTRATIVE REMEDIES ARE EXHAUSTED

§ 243. In General: Highest Agency Empowered to Act Must Have Done So.

p. 225, n. 98. See the cases cited in § 45 et seq. and § 227.

Administrative Procedure Act. The Administrative Procedure Act, Sec. 10(e), provides that: "Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority."

Federal Alcohol Administration. *Strauss v. Berkshire* (C. C. A. 8th, 1942) 132 F. (2d) 530; *Leebern v. United States* (C. C. A. 5th, 1941) 124 F. (2d) 505; *Peoria Braumeister Co. v. Yellowley* (C. C. A. 7th, 1941) 123 F. (2d) 637.

Railroad Retirement Board. See *Bruno v. Railroad Retirement Board* (D. C. W. D. Pa., 1942) 47 F. Supp. 3.

Secretary of Agriculture. See *United States v. Wood* (D. C. D. Mass., 1945) 61 F. Supp. 175 and *United States v. Ridgeland Creamery* (D. C. W. D. Wis., 1942) 47 F. Supp. 145.

§ 245. Rehearing.

Administrative remedies may be exhausted despite the presence of a regulation of the agency providing that the agency "may," in its discretion, entertain a rehearing, at which oral argument before the agency might have been heard for the first time. Under this regulation the agency is not required to hear oral argument. *Levers v. Anderson* (1945) 326 U. S. 219, 90 L. Ed. 26, 66 S. Ct. 72.

"It is suggested, by the protesting intervenors, that appellant has failed to exhaust its administrative remedy by neglecting to apply a second time for reconsideration by the Commission after the final Harms decision . . . although it was rendered after the complaint was filed in this case. The suggestion, if followed generally, conceivably could result in keeping applicants running back and forth between court and commission, if not interminably, then to an extent certainly not contemplated by the exhaustion doctrine. Appellant fulfilled the requirements of that doctrine by its application for reconsideration made to the entire Commission and its denial of the petition." (Mr. Justice Rutledge in *Barrett Line, Inc. v. United States* (1945) 326 U. S. 179, 197, 89 L. Ed. 2128, 65 S. Ct. 1504.)

Where a statute does not require that application for rehearing be made prior to seeking of judicial review, an administrative regulation purporting to impose such a requirement would probably be in-

valid. See *Levers v. Anderson* (1945) 326 U. S. 219, 90 L. Ed. 26, 66 S. Ct. 72.

See § 185.

p. 227, n. 14. *Levers v. Anderson* (1945) 326 U. S. 219, 90 L. Ed. 26, 66 S. Ct. 72; *Colorado Radio Corp. v. Federal Communications Commission* (1941) 78 U. S. App. D. C. 46, 118 F. (2d) 24.

p. 227, n. 15. "Motions for rehearing before the same tribunal that enters an order are under normal circumstances mere formalities which waste the time of the litigants and tribunals, tend unnecessarily to prolong the administrative process, and delay or embarrass enforcement of orders which have all the characteristics of finality essential to appealable orders." (Mr. Justice Black in *Levers v. Anderson* (1945) 326 U. S. 219, 222, 90 L. Ed. 26, 66 S. Ct. 72.)

p. 228, n. 20. The contentions of a party have not been passed upon by the agency where the opportunity to challenge a particular administrative order offered by a motion for rehearing may subject the order to such critical administrative review as to reduce it to the level of a mere preliminary or procedural order, thereby divesting it of those qualities of administrative finality essential to invocation of judicial review. *Levers v. Anderson* (1945) 326 U. S. 219, 90 L. Ed. 26, 66 S. Ct. 72.

p. 228, n. 21. *Braniff Airways v. Civil Aeronautics Board* (App. D. C., 1945) 147 F. (2d) 152; *Colorado Radio Corp. v. Federal Communications Commission* (1941) 78 U. S. App. D. C. 46, 118 F. (2d) 24.

p. 229, n. 27. *Braniff Airways v. Civil Aeronautics Board* (App. D. C., 1945) 147 F. (2d) 152.

PART III

METHODS OF JUDICIAL REVIEW

CHAPTER 17

IN GENERAL

I. METHODS OF INTERLOCUTORY JUDICIAL REVIEW

§ 246. In General.

p. 230, n. 5. See *National Labor Relations Board v. Indiana & Michigan Electric Co.* (1943) 318 U. S. 9, 87 L. Ed. 579, 63 S. Ct. 394 and § 732.

p. 230, n. 6. *National Labor Relations Board v. National Laundry Co.* (App. D. C., 1943) 138 F. (2d) 589.

II. METHODS OF FINAL JUDICIAL REVIEW

§ 247. In General.

The supremacy of law is procedurally implemented by a general availability of methods of judicial review in the federal courts. See vom Baur, "Methods of Judicial Review of Administrative Determinations," *New York Law Journal* for May 26, 27, 28 and 29, 1947, p. 2072; the Administrative Procedure Act, § 10 (b), (c); and §§ 3, 41, herein.

Judicial review may also be had by action in equity in a Federal District Court for a declaratory judgment. See § 707.

Judicial review of administrative action cannot be secured indirectly through a proceeding to which the agency is not a party. See § 798.

A method under certain circumstances for obtaining judicial review of the determination of an agency that a party is within the permit requirement of an Act is to file an application for the permit and move to have the application dismissed on the ground that it is not required under the Act. An order determining that the applicant is within the permit requirement is then a reviewable order. *Schenley Distillers Corp. v. United States* (1946) 326 U. S. 432, 90 L. Ed. 181, 66 S. Ct. 247.

p. 231, n. 16. The assertion of the invalidity of an administrative order or determination as a defense to a criminal prosecution is now treated in the succeeding section. See § 247A.

§ 247A. (New) Invalidity of Administrative Action as a Defense to Criminal Prosecution.

The invalidity of an administrative order or regulation may be asserted as a defense to a criminal prosecution unless prescribed administrative remedies have not been exhausted. See § 227 et seq. and § 632.

Federal Security Administrator. *United States v. Lord-Mott Co.* (D. C. D. Md., 1944) 57 F. Supp. 128.

Price Administrator. *Yakus v. United States* (1944) 321 U. S. 414, 88 L. Ed. 834, 64 S. Ct. 660.

Selective Service Boards. **Estep v. United States* (1946) 327 U. S. 114, 90 L. Ed. 567, 66 S. Ct. 423; **Falbo v. United States* (1944) 320 U. S. 549, 88 L. Ed. 305, 64 S. Ct. 346; *Rusk v. United States* (C. C. A. 5th, 1946) 154 F. (2d) 763; *Dodez v. United States* (C. C. A. 6th, 1946) 154 F. (2d) 637; *Lancaster v. United States* (C. C. A. 1st, 1946) 153 F. (2d) 718; *Van Bibber v. United States* (C. C. A. 8th, 1945) 151 F. (2d) 444; *Johnson v. United States* (C. C. A. 8th, 1942) 126 F. (2d) 242; *United States v. Kirschenman* (D. C. D. S. D., 1946) 65 F. Supp. 153; *United States v. Pace* (D. C. Tex., 1942) 46 F. Supp. 316; *United States v. Di Lorenzo* (D. C. Del., 1942) 45 F. Supp. 590; *United States v. Bowen* (D. C. Del., 1942) 45 F. Supp. 301; *United States v. Neuman* (D. C. Ill., 1942) 44 F. Supp. 817.

War Food Administrator. *United States v. Ashley Bread Co.* (D. C. S. D. W. Va., 1944) 59 F. Supp. 671.

Law Review Article. See B. F. Lindsley, "The Necessity for Exhausting Administrative Remedies—Its Consequences in Judicial Review of Selective Service Cases" (1944) 32 *Georgetown L. J.* 385.

Administrative Procedure Act. Under the Administrative Procedure Act, Sec. 10(b), "Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law."

The rule just stated is a corollary of the rule set forth in the chapter on Exhaustion of Administrative Remedies. Judicial relief against invalid administrative action may not be obtained until prescribed administrative remedies have been exhausted. See § 227 et seq.

A fortiori, the invalidity of administrative action may not be asserted in a habeas corpus proceeding in advance of trial for failure to report for induction into the Army, where administrative remedies have not been exhausted. *United States v. McGinnis* (C. C. A. 4th, 1944) 146 F. (2d) 851.

The question has been left open whether the prescribed administrative procedure need first be exhausted where an administrative regulation is assailed as unconstitutional on its face, as a defense to a criminal prosecution. *Yakus v. United States* (1944) 321 U. S. 414, 88 L. Ed. 834, 64 S. Ct. 660.

Similarly left open is the question whether one forced to trial for violation of a price regulation, while contesting its validity by the statutory administrative procedure, can avail himself of the defense that the regulation is invalid. *Yakus v. United States* (1944) 321 U. S. 404, 88 L. Ed. 834, 64 S. Ct. 660.

PART IV

EXTENT AND SCOPE OF JUDICIAL REVIEW

SUBDIVISION I

GENERAL CONSIDERATIONS

CHAPTER 18

PRINCIPLES OF JUDICIAL REVIEW

I. IN GENERAL

§ 249. The General Scope of Judicial Review.

The scope of proper judicial review does not expand or contract depending on what party invokes it. See §§ 148A, 508, 509, 516.

A statutory limitation on the scope of judicial review of administrative action to questions of law is jurisdictional. *West v. Commissioner of Internal Revenue* (C. C. A. 5th, 1945) 150 F. (2d) 723, cert. den. 327 U. S. 815, 328 U. S. 877, 881, 90 L. Ed. 1646, 66 S. Ct. 488, 489, 679, 680. Compare §§ 3, 41 and 650.

Quotation. "The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." (Mr. Justice Frankfurter in *Securities & Exchange Commission v. Chenery Corp.* (1943) 318 U. S. 80, 87 L. Ed. 626, 63 S. Ct. 454.)

p. 235, n. 1. **Social Security Board v. Nierotko* (1946) 327 U. S. 358, 90 L. Ed. 718, 66 S. Ct. 637. See *West v. Commissioner of Internal Revenue* (C. C. A. 5th, 1945) 150 F. (2d) 723, cert. den. 327 U. S. 815, 328 U. S. 877, 881, 90 L. Ed. 1646, 66 S. Ct. 488, 489, 679, 680.

The scope of questions of law is more specifically treated in §§ 424, 425 et seq.

"But if the action is based upon a determination of law as to which the reviewing authority of the courts does come into play, an order may not stand if the agency has misconceived the law." (Mr. Justice Frankfurter in *Securities & Exchange Commission v. Chenery Corp.* (1943) 318 U. S. 80, 94, 87 L. Ed. 626, 63 S. Ct. 454.)

p. 235, n. 2. *Alien Cases*. *Wing Art v. Carmichael* (C. C. A. 9th, 1941) 117 F. (2d) 158, cert. den. 313 U. S. 595, 85 L. Ed. 1548, 61 S. Ct. 1109.

Federal Power Commission. *Connecticut Light & Power Co. v. Federal Power Commission* (1945) 324 U. S. 515, 89 L. Ed. 1150, 65 S. Ct. 749.

Interstate Commerce Commission. *Reconstruction Finance Corp. v. Bankers Trust Co.* (1943) 318 U. S. 163, 87 L. Ed. 680, 63 S. Ct. 515.

Tax Court. *West v. Commissioner of Internal Revenue* (C. C. A. 5th, 1945) 150 F. (2d) 723, rehearings denied 327 U. S. 815, 90 L. Ed. 1039, 66 S. Ct. 679, 680, 328 U. S. 877, 881, 90 L. Ed. 1646, 1648, 66 S. Ct. 1008, 1009, 1359; *A. R. Jones Oil & Operating Co. v. Commissioner of Internal Revenue* (C. C. A. 10th, 1940) 114 F. (2d) 642.

Administrative Procedure Act. "(e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, or conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error." (Administrative Procedure Act, Sec. 10(e).)

Law Review Article. See R. L. Stern, "Review of Findings of Administrators, Judges and Juries: A Comparative Analysis" (1944) 58 Harv. L. Rev. 70.

p. 237, n. 4. *Opp Cotton Mills, Inc. v. Administrator of Wage & Hour Division* (1941) 312 U. S. 126, 85 L. Ed. 624, 61 S. Ct. 524.

§ 250. Fundamental Analysis: Whether Questions Are Administrative or Judicial.

p. 239, n. 14. *Security Flour Mills Co. v. Commissioner of Internal Revenue* (1944) 321 U. S. 281, 88 L. Ed. 725, 64 S. Ct. 596.

For a discussion of difficulties thought to be encountered in first defining, and then differentiating "questions of law" and "questions of fact," see Mr. Justice Frankfurter concurring in *Bingham's Trust v. Commissioner of Internal Revenue* (1945) 325 U. S. 365, 89 L. Ed. 1670, 65 S. Ct. 1232. Compare, however, the principles governing delegation of legislative power which permit the delegation to administrative agencies of power to determine facts, but not the power to make law. See § 13. Administrative law is necessarily constructed, under the Constitution, around the contrast between law and fact, and the differences between law and fact mark the partitions between the judicial and legislative spheres of government. See §§ 3, 4, 41-45.

§ 251. Court Will Not Assume That Unlawful Administrative Action Is Intended.

p. 239, n. 18. See also § 755.

Administrator of the Wage and Hour Division. *Addison v. Holly Hill Fruit Products* (1944) 322 U. S. 607, 88 L. Ed. 1488, 64 S. Ct. 1215.

Federal Power Commission. See *Aluminum Co. of America v. Federal Power Commission* (App. D. C., 1942) 130 F. (2d) 445.

Interstate Commerce Commission. It is to be expected that an administrative agency will perform its duties under the statute. *Interstate Commerce Commission v. Parker* (1945) 326 U. S. 60, 89 L. Ed. 2051, 65 S. Ct. 1490.

Price Administrator. * *Yakus v. United States* (1944) 321 U. S. 414, 88 L. Ed. 834, 64 S. Ct. 660; *Bowles v. Insel* (C. C. A. 3rd, 1945) 148 F. (2d) 91; *Bowles v. Glick Bros. Lumber Co.* (C. C. A. 9th, 1945) 146 F. (2d) 566, cert. den. 325 U. S. 877, 89 L. Ed. 1994, 65 S. Ct. 1578.

Securities and Exchange Commission. *McGarry v. Securities & Exchange Commission* (C. C. A. 10th, 1945) 147 F. (2d) 389.

§ 252. Suits by or Against Administrative Agencies Are Civil in Nature.

While a hearing on a petition for a writ of habeas corpus to test the legality of detention under a deportation order is a civil proceeding, deportation is a penalty. See *Bridges v. Wixon* (1945) 326 U. S. 135, 89 L. Ed. 2103, 65 S. Ct. 1443. See also § 708.

§ 252A. (New) Estoppel of and Laches by Administrative Agencies.

An administrative agency is bound by its own valid legislative regulations as these have the force of law. See § 492.

An administrative agency is also bound by statements by its counsel made to the court in a judicial proceeding. *United States v. 43.7 Acres of Land in Garrett County, Md.* (D. C. D. Md., 1942) 43 F. Supp. 347. See *United States v. New York Telephone Co.* (1946) 326 U. S. 638, 90 L. Ed. 371, 66 S. Ct. 393.

An administrative agency must observe its rules promulgated pursuant to law. *Bridges v. Wixon* (1945) 326 U. S. 135, 89 L. Ed. 2103, 65 S. Ct. 1443.

Procedural regulations are also binding on administrative agencies. *United States v. Laier* (D. C. N. D. Col., S. D., 1943) 52 F. Supp. 392. See § 495.

An administrative agency is also bound by its own official interpretation or construction of a statute.

Commissioner of Internal Revenue. *United Fruit Co. v. Hassett* (D. C. D. Mass., 1945) 61 F. Supp. 1013.

Price Administrator. *F. Uri & Co. v. Bowles* (C. C. A. 9th, 1945) 152 F. (2d) 713; *Bowles v. Indianapolis* (C. C. A. 7, 1945) 150 F. (2d) 597; *Wells Lamont Corp. v. Bowles* (Em. Ct. App., 1945) 149 F. (2d) 364, cert. den. 326 U. S. 730, 90 L. Ed. 434, 66 S. Ct. 37, rehearing den. 326 U. S. 808, 90 L. Ed. 492, 66 S. Ct. 136; *Bowles v. Hansen Packing Co.* (D. C. D. Mont., 1946) 64 F. Supp. 131; *Bowles v. Vance* (D. C. W. D. Penn., 1946) 64 Supp. 647.

But an agency is never bound or estopped by an erroneous interpretation of a statute. *United States v. City and County of San Francisco* (1940) 310 U. S. 16, 84 L. Ed. 1050, 60 S. Ct. 749, rehearing den. 310 U. S. 657, 84 L. Ed. 1420, 60 S. Ct. 1071; *National Rifle Ass'n v. Young* (App. D. C., 1943) 134 F. (2d) 524; *Commissioner of Internal Revenue v. American Light & Traction Co.* (C. C. A. 7th, 1942) 125 F. (2d) 365; *Pennsylvania Water & Power Co.*

v. Federal Power Commission (App. D. C., 1941) 123 F. (2d) 155, cert. den. 315 U. S. 806, 86 L. Ed. 1205, 62 S. Ct. 640. See also § 488.

An administrative agency may not be estopped from acting in its quasi-judicial capacity, that is from determining facts as empowered by statute. *National Labor Relations Board v. T. W. Phillips Gas & Oil Co.* (C. C. A. 3rd, 1944) 141 F. (2d) 304; *National Labor Relations Board v. Baltimore Transit Co.* (C. C. A. 4th, 1944) 140 F. (2d) 51, cert. den. 321 U. S. 795, 88 L. Ed. 1084, 64 S. Ct. 848; *Utah Copper Co. v. National Labor Relations Board* (C. C. A. 10th, 1944) 139 F. (2d) 788, cert. den. 322 U. S. 731, 88 L. Ed. 1566, 64 S. Ct. 946; *National Labor Relations Board v. Thompson Products, Inc.* (C. C. A. 6th, 1942) 130 F. (2d) 363. See *Wallace Corp. v. National Labor Relations Board* (1945) 323 U. S. 248, 89 L. Ed. 216, 65 S. Ct. 238; *Magnolia Petroleum Co. v. National Labor Relations Board* (C. C. A. 10th, 1944) 142 F. (2d) 802, and § 151A.

An administrative agency may not be estopped by any act which the law does not permit. *Utah Power & Light Co. v. United States* (1917) 243 U. S. 389, 61 L. Ed. 791, 37 S. Ct. 387.

Only official acts, regulations or interpretations may be binding on an administrative agency. It may not be bound by unofficial or unauthorized acts or statements of its employees, even though such be within their apparent authority.

Alcohol Tax Unit. *Middlesboro Liquor & Wine Co. v. Berkshire* (App. D. C., 1942) 133 F. (2d) 39.

Commissioner of Internal Revenue. *Ross v. Commissioner of Internal Revenue* (C. C. A. 6th, 1942) 129 F. (2d) 310.

Interstate Commerce Commission. A written statement by the Secretary of the Interstate Commerce Commission does not necessarily bind the Commission. *Thompson v. Texas Mexican Ry. Co.* (1946) 328 U. S. 134, 90 L. Ed. 1132, 66 S. Ct. 937.

The President. *Swiss Nat. Ins. Co. v. Crowley* (App. D. C., 1943) 136 F. (2d) 265, cert. den. 320 U. S. 763, 88 L. Ed. 455, 64 S. Ct. 70.

Price Administrator. *Schreffler v. Bowles* (C. C. A. 10th, 1946) 153 F. (2d) 1; *Bowles v. Lentin* (C. C. A. 7th, 1945) 151 F. (2d) 615; *Bowles v. Indianapolis Glove Co.* (C. C. A. 7th, 1945) 150 F. (2d) 597; *Wells Lamont Corp. v. Bowles* (Em. Ct. App., 1945) 149 F. (2d) 364, cert. den. 326 U. S. 730, 90 L. Ed. 434, 66 S. Ct. 37, rehearing den. 326 U. S. 808, 90 L. Ed. 492, 66 S. Ct. 136; *Bowles v. Vance* (D. C. W. D. Pa., 1946) 64 F. Supp. 647; *Bowles v. Hansen Packing Co.* (D. C. D. Mont., 1946) 64 F. Supp. 131; *Bowles v. Ammon* (D. C. D. Neb., 1945) 61 F. Supp. 106. But see *Bowles v. Fruit Growers Cooperative* (D. C. E. D. Wis., 1945) 61 F. Supp. 745.

Secretary of Agriculture. *Queensboro Farms Products Co. v. Wickard* (C. C. A. 2d, 1943) 137 F. (2d) 969; *Nichols & Co. v. Secretary of Agriculture* (C. C. A. 1st, 1942) 131 F. (2d) 651; *Wetmiller Dairy & Farm Products Co., Inc. v. Wickard* (D. C. W. D. N. Y., 1944) 60 F. Supp. 622.

Secretary of the Interior. *Utah Power & Light Co. v. United States* (1917) 243 U. S. 389, 61 L. Ed. 791, 37 S. Ct. 387.

Secretary of War. *United States v. Foster* (C. C. A. 8th, 1942) 131 F. (2d) 3, cert. den. 318 U. S. 767, 87 L. Ed. 1138, 63 S. Ct. 760;

Pennsylvania Water & Power Co. v. Federal Power Commission (App. D. C. 1941) 123 F. (2d) 155, cert. den. 315 U. S. 806, 86 L. Ed. 1205, 62 S. Ct. 640.

Even where their official acts are involved, administrative agencies are not estopped by their affirmative conduct unless there is adequate proof of a disadvantageous change of position by an opposing party.

Commissioner of Internal Revenue. Knapp-Monarch Co. v. Commissioner of Internal Revenue (C. C. A. 6th, 1942) 139 F. (2d) 863; Ross v. Commissioner of Internal Revenue (C. C. A. 6th, 1942) 129 F. (2d) 310; Stearns Coal & Lumber Co. v. Glenn (D. C. W. D. Ky., Louisville Div., 1941) 42 F. Supp. 28.

State Agencies. National Rifle Ass'n v. Young (C. C. A. 5th, 1945) 151 F. (2d) 458.

A determination by the agent of an administrative body made in a preliminary investigation does not estop the administrative body to deny the facts so determined. Locomotive Finished Material Co. v. National Labor Relations Board (C. C. A. 10th, 1944) 142 F. (2d) 802. Action in a prior proceeding does not estop an administrative agency to act on an inconsistent legal basis in a later proceeding. Regensburg v. Commissioner of Internal Revenue (C. C. A. 2d, 1944), 144 F. (2d) 41, cert. den. 323 U. S. 783, 89 L. Ed. 625, 65 S. Ct. 272.

An administrative agency may not be estopped on the ground that its failure to institute proceedings caused a party to change its position. See § 151A.

The doctrine of estoppel by judgment, that is, *res judicata*, is inherently inapplicable to the determinations of administrative agencies. See § 255 et seq.

However, the doctrine of estoppel may apply to the acts of government officials and agencies where there is adequate proof of a disadvantageous change of position by a party in reliance upon the authorized conduct of the official or agency. Vestal v. Commissioner of Internal Revenue (App. D. C., 1945) 152 F. (2d) 132. Knapp-Monarch Co. v. Commissioner of Internal Revenue (C. C. A. 8th, 1944) 139 F. (2d) 863.

An administrative agency is not guilty of laches in the absence of adequate proof of a disadvantageous change of position by an opposing party. National Labor Relations Board v. William Davies Co. (C. C. A. 7th, 1943) 135 F. (2d) 179, cert. den. 320 U. S. 770, 88 L. Ed. 460, 64 S. Ct. 82; National Labor Relations Board v. Grower-Shipper Vegetable Ass'n of Central California (C. C. A. 9th, 1941) 122 F. (2d) 368.

§ 252B. (New) Laches on Part of Person Seeking Judicial Review.

In accordance with orthodox principles, a person seeking judicial review may not be barred therefrom on the ground of laches in the absence of a persuasive showing of disadvantageous change of position to an opposing party. American Trucking Ass'ns Inc. v. United States (1945) 326 U. S. 77, 89 L. Ed. 2065, 65 S. Ct. 1499; Inland Motor Freight v. United States (D. C. E. D. Wash., 1945) 60 F. Supp. 520.

II. JUDICIAL REVIEW GOVERNED BY EQUITABLE PRINCIPLES

§ 253. **Equitable Principles Govern.**

p. 241, n. 28. See *Sperry Gyroscope Co. v. National Labor Relations Board* (C. C. A. 2d, 1942) 129 F. (2d) 922.

III. RES JUDICATA AND COMPANION PRINCIPLES OF JUDICIAL ADMINISTRATION

§ 256. **First Situation: Effect of Prior Administrative Determination in Subsequent Administrative Proceeding.**

An administrative construction of a statute cannot constitute the "law of the case." While it determines the policy of the agency in administering the statute, it cannot override the provisions of the statute itself, or the decisions of the courts construing it. *Stearns Coal & Lumber Co. v. Glenn* (D. C. W. D. Ky., Louisville Div., 1941) 42 F. Supp. 28. See §§ 178, 478 et seq.

Where by statute an administrative determination is made binding in subsequent judicial proceedings, it would necessarily also be binding in subsequent administrative proceedings. See § 257.

p. 244, n. 55. **Commissioner of Internal Revenue.** *Bennett v. Helvering* (C. C. A. 2d, 1943) 137 F. (2d) 537.

Federal Trade Commission. See *Hastings Mfg. Co. v. Federal Trade Commission* (C. C. A. 6th, 1946) 153 F. (2d) 253.

Interstate Commerce Commission. *Board of Trade of Kansas City, Mo. v. United States* (1942) 314 U. S. 534, 86 L. Ed. 432, 62 S. Ct. 366, rehearing den. 315 U. S. 826, 86 L. Ed. 1222, 62 S. Ct. 621; *Chicago, B. & Q. R. Co. v. United States* (D. C. E. D. Ky., 1945) 60 F. Supp. 580; *Northern Pac. Ry. Co. v. United States* (D. C. D. Minn., Fourth Div., 1941) 41 F. Supp. 439.

National Labor Relations Board. *Inland Empire District Council, L. S. W. U. v. Millis* (1945) 325 U. S. 697, 89 L. Ed. 1877, 65 S. Ct. 1316; *National Labor Relations Board v. Baltimore Transit Co.* (C. C. A. 4th, 1944) 140 F. (2d) 51, cert. den. 321 U. S. 795, 88 L. Ed. 1084, 64 S. Ct. 848; *National Labor Relations Board v. Thompson Products, Inc.* (C. C. A. 6th, 1942) 130 F. (2d) 363; *National Labor Relations Board v. Hawk & Buck Co., Inc.* (C. C. A. 5th, 1941) 120 F. (2d) 903. See *National Labor Relations Board v. Stone* (C. C. A. 7th, 1942) 125 F. (2d) 752, cert. den. 317 U. S. 649, 87 L. Ed. 522, 63 S. Ct. 44.

State Agencies. *National Rifle Ass'n v. Young* (App. D. C., 1943) 134 F. (2d) 524.

Tax Court. *Chiquita Mining Co. v. Commissioner of Internal Revenue* (C. C. A. 9th, 1945) 148 F. (2d) 306. See *Louisville Property Co. v. Commissioner of Internal Revenue* (C. C. A. 6th, 1944) 140 F. (2d) 547, cert. den. 322 U. S. 754, 88 L. Ed. 1584, 64 S. Ct. 1268.

War Food Administrator. * *Grandview Dairy, Inc. v. Jones* (D. C. E. D. N. Y., 1945) 61 F. Supp. 460, citing *vom Baur*, *Federal Administrative Law*.

Workmen's Compensation Cases. *McCarthy Stevedoring Corp. v. Norton* (D. C. E. D. Pa., 1940) 40 F. Supp. 960. But see *Stansfield v. Lykes Bros. S. S. Co.* (C. C. A. 5th, 1942) 124 F. (2d) 999.

p. 245, n. 56. *Chicago, B. & Q. R. Co. v. United States* (D. C. E. D. Ky., 1945) 60 F. Supp. 580.

The decisions of an administrative agency are not *stare decisis*. *Northern Pac. Ry. Co. v. United States* (D. C. D. Minn., Fourth Div., 1941) 41 F. Supp. 439.

p. 245, n. 59. For an illustration where an agency determined an administrative question, by dismissing the petitions for certification as bargaining agent

under the National Labor Relations Act, 28 USC 159 (e), then vacated the determination and later certified the petitioner, see *Inland Empire District Council, L. S. W. U. v. Millis* (1945) 325 U. S. 697, 89 L. Ed. 1877, 65 S. Ct. 1316.

p. 246, n. 63. *National Labor Relations Board v. Hawk & Buck Co., Inc.* (C. C. A. 5th, 1941) 120 F. (2d) 903.

§ 257. (Changed) Second Situation: Effect of Administrative Determination in Subsequent Judicial Proceedings.

An administrative order which becomes judicially binding by operation of state law is *res judicata* as to all matters which could have been litigated as well as all matters which were litigated. *Magnolia Petroleum Co. v. Hunt*, 320 U. S. 430, 88 L. Ed. 149, 64 S. Ct. 208 (1943).

In an action to recover freight charges in which the principal question was whether certain pieces of pipe constituted "pipe fittings" or "scrap," under the applicable tariff, an opinion of the Interstate Commerce Commission that similar, but not the shipments involved, constituted pipe fittings, was not *res judicata*, although it was entitled to consideration by the court. *Crancer v. Lowden* (1942) 315 U. S. 631, 86 L. Ed. 1077, 62 S. Ct. 763.

By virtue of failure to bring judicial review within a specified period, a statute may give to an administrative determination the effect of a judgment so that it becomes *res judicata*.

Federal Trade Commission. *United States v. Willard* (C. C. A. 7th, 1944) 141 F. (2d) 141. But see *Brunswick-Balke-Collender Co. v. American Bowling & Billiard Corp.* (C. C. A. 2d, 1945) 150 F. (2d) 69, cert. den. 326 U. S. 757, 90 L. Ed. 455, 66 S. Ct. 99.

State Agencies. *Magnolia Petroleum Co. v. Hunt* (1943) 320 U. S. 430, 88 L. Ed. 149, 64 S. Ct. 208; *General Motors Corp. v. Holler* (C. C. A. 8th, 1945) 150 F. (2d) 297.

Tax Court. A decision by the Tax Court determining the amount of an estate tax due may, by virtue of the statute, become *res judicata* so as to bar a subsequent suit for refund. *Moir v. United States* (C. C. A. 1st, 1945) 149 F. (2d) 455; *Hartford-Empire Co. v. Commissioner of Internal Revenue* (C. C. A. 2d, 1943) 137 F. (2d) 540, cert. den. 320 U. S. 787, 88 L. Ed. 473, 64 S. Ct. 196. See *Pelham Hall Co. v. Hassett* (C. C. A. 1st, 1945) 147 F. (2d) 63.

p. 247, n. 69. **Price Administrator.** *Bowles v. Griffin* (C. C. A. 5th, 1945) 151 F. (2d) 458.

State Agencies. *National Rifle Ass'n v. Young* (App. D. C., 1943) 134 F. (2d) 524.

Tax Court. See *Leicht v. Commissioner of Internal Revenue* (C. C. A. 8th, 1943) 137 F. (2d) 433.

§ 258. Third Situation: Effect of Judicial Review Decree in Subsequent Judicial Proceedings.

An order directing compliance with an administrative subpoena after a preliminary hearing on statutory coverage is a mere exercise of the court's discretion and no adjudication on the merits of any case arising out of the matter. *Mississippi Road Supply Co. v.*

Walling (C. C. A. 5th, 1943) 136 F. (2d) 391, cert. den. 320 U. S. 752, 88 L. Ed. 447, 64 S. Ct. 57.

Dismissal of a case as being moot is not such a decision on the merits as to constitute *res judicata* of the questions involved. National Labor Relations Board v. Delaware-New Jersey Ferry Co. (C. C. A. 3rd, 1942) 128 F. (2d) 130.

A previous judicial decision invalidating an administrative order is not *res judicata* in a subsequent judicial proceeding involving an attack on an administrative order addressed to related, but different facts. Federal Trade Commission v. Raladam Co. (1942) 316 U. S. 149, 86 L. Ed. 1336, 62 S. Ct. 966.

p. 248, n. 77. Safeway Stores v. Porter (Em. App., 1946) 154 F. (2d) 656. See International Union of Mine, Mill & Smelter Workers v. Eagle-Picher Mining & Smelting Co. (1945) 325 U. S. 335, 89 L. Ed. 1649, 65 S. Ct. 1166.

"There is privity between officers of the same government so that a judgment in a suit between a party and a representative of the United States is *res judicata* in relitigation of the same issue between that party and another officer of the government." (Mr. Justice Douglas in Sunshine Anthracite Coal Co. v. Adkins (1940) 310 U. S. 381, 403, 84 L. Ed. 1263, 60 S. Ct. 907.)

p. 248, n. 78. Consolidated Freightways, Inc. v. Railroad Commission of California (D. C. N. D. Calif., 1941) 36 F. Supp. 269.

p. 248, n. 79. See Magnolia Petroleum Co. v. Hunt, 320 U. S. 430, 88 L. Ed. 149, 64 S. Ct. 208 (1943).

§ 259. Fourth Situation: Effect of Judicial Review Decree in Subsequent Administrative Proceedings.

A previous judicial decision is not *res judicata* in a subsequent administrative proceeding where there is no identity of issue. See Sprague v. Woll (C. C. A. 7th, 1941) 122 F. (2d) 128, cert. den. 314 U. S. 669, 86 L. Ed. 535, 62 S. Ct. 131.

An administrative determination open to judicial review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy. Chenery Corp. v. Securities & Exchange Commission (1946) 154 F. (2d) 6.

p. 251, n. 96. Erie R. Co. v. United States (D. C. S. D. Ohio, 1945) 64 F. Supp. 162.

SUBDIVISION II

EXTENT AND SCOPE OF JUDICIAL REVIEW OF ADMINISTRATIVE SANCTIONS

CHAPTER 19

IN GENERAL

§ 260. Nature and Reviewability of Administrative Sanctions.

An administrative sanction may not contravene the policies expressed by other legislation of Congress. Southern S. S. Co. v.

National Labor Relations Board (1942) 316 U. S. 31, 86 L. Ed. 1246, 62 S. Ct. 886; National Labor Relations Board v. United States Truck Co. (C. C. A. 6th, 1942) 124 F. (2d) 887.

For instance, a sanction in an order of the National Labor Relations Board requiring reinstatement of strikers who had violated provisions of law relating to mutiny on shipboard, 18 USC 483, 484, was held invalid as contrary to the policy of Congress. *Southern S. S. Co. v. National Labor Relations Board* (1942) 316 U. S. 31, 86 L. Ed. 1246, 62 S. Ct. 886.

Under the Federal Trade Commission Act, judicial review of cease and desist orders includes the power to modify the remedy, after the Commission has found an unfair trade practice, if the remedy is an abuse of the Commission's discretion. The court will not use this power, however, until the Commission has specifically considered whether the order made best serves the purpose of the Act. *Jacob Siegel Co. v. Federal Trade Commission*, 327 U. S. 608, 90 L. Ed. 888, 66 S. Ct. 758 (1946).

A court upon judicial review cannot order a delay in putting a lawful administrative order into effect. *American Chain & Cable Co. v. Federal Trade Commission* (C. C. A. 4th, 1944) 142 F. (2d) 909.

The question whether an order or sanction is "punitive" or "penal" or not is one of law. *National Labor Relations Board v. United States Truck Co.* (C. C. A. 6th, 1942) 124 F. (2d) 887. See also § 81.

The scope of administrative proceedings is measured on judicial review by the directive part of the administrative order, not by its recitals, save as those may be necessary to throw light upon the rest; nor by what the parties said in their arguments and briefs, or in the course of the hearings. *W. R. Grace & Co. v. Civil Aeronautics Board* (C. C. A. 2d, 1946) 154 F. (2d) 271.

Administrative Procedure Act. The Administrative Procedure Act contains the following provisions with respect to administrative sanctions: "(f) SANCTION AND RELIEF.—'Sanction' includes the whole or part of any agency (1) prohibition, requirement, limitation, or other condition affecting the freedom of any person; (2) withholding of relief; (3) imposition of any form of penalty or fine; (4) destruction, taking, seizure, or withholding of property; (5) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees; (6) requirement, revocation, or suspension of a license; or (7) taking of other compulsory or restrictive action. 'Relief' includes the whole or part of any agency (1) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy; (2) recognition of any claim, right, immunity, privilege, exemption, or exception; or (3) taking of any other action upon the application or petition of, and beneficial to, any person." (Administrative Procedure Act, Sec. 2(f).)

"(a) IN GENERAL.—No sanction shall be imposed or substantive rule or order be issued except within jurisdiction delegated to the agency and as authorized by law." (Administrative Procedure Act, Sec. 9(a).)

p. 252, n. 2. The sanction of the statute as applied by the administrative order may be assailed as exceeding the powers of the agency under the Act without questioning the validity of the administrative action involved. *Gemseo, Inc. v. Walling* (1945) 324 U. S. 244, 89 L. Ed. 921, 65 S. Ct. 605. Orders and sanctions which exceed the statutory authority of any agency will be set aside. *Strauss v. Berkshire* (C. C. A. 8th, 1942) 132 F. (2d) 530.

p. 253, n. 5. *Alien Cases. Kazue Sumi v. Carmichael* (C. C. A. 9th, 1941) 118 F. (2d) 707.

Federal Trade Commission. *Federal Trade Commission v. A. P. W. Paper Co., Inc.* (1946) 328 U. S. 193, 90 L. Ed. 1165, 66 S. Ct. 932; *Charles of the Ritz Dist. Corp. v. Federal Trade Commission* (C. C. A. 2d, 1944) 143 F. (2d) 676; *Parke, Austin & Lipscomb v. Federal Trade Commission* (C. C. A. 2d, 1944), 142 F. (2d) 437, cert. den. 323 U. S. 753, 89 L. Ed. 603, 65 S. Ct. 86; *American Chain & Cable Co. v. Federal Trade Commission* (C. C. A. 4th, 1944) 142 F. (2d) 909. See *Jacob Siegel Co. v. Federal Trade Commission*, 327 U. S. 608, 90 L. Ed. 888, 66 S. Ct. 758 (1946).

National Labor Relations Board. *Virginia Electric & Power Co. v. National Labor Relations Board* (1943) 319 U. S. 533, 87 L. Ed. 1568, 63 S. Ct. 1214; **Phelps Dodge Corp. v. National Labor Relations Board* (1941) 313 U. S. 177, 85 L. Ed. 1271, 61 S. Ct. 845, 133 A. L. R. 1217; *National Labor Relations Board v. May Department Stores* (C. C. A. 8th, 1946) 154 F. (2d) 533; *National Labor Relations Board v. American Laundry Machinery Co.* (C. C. A. 2d, 1945) 152 F. (2d) 400; *National Labor Relations Board v. Gluck Brewing Co.* (C. C. A. 8th, 1944) 144 F. (2d) 847; *National Labor Relations Board v. Northwestern Mutual Fire Ass'n* (C. C. A. 9th, 1944) 142 F. (2d) 866, cert. den. 323 U. S. 726, 89 L. Ed. 583, 65 S. Ct. 59; *National Labor Relations Board v. Cape County Milling Co.* (C. C. A. 8th, 1944) 140 F. (2d) 543; *Williams Motor Co. v. National Labor Relations Board* (C. C. A. 8th, 1942) 128 F. (2d) 960; *Sperry Gyroscope Co. v. National Labor Relations Board* (C. C. A. 2d, 1942) 129 F. (2d) 922.

Since the legislature cannot, in the nature of things, catalogue either the stratagems to circumvent the policies of a statute or the remedies proper to effectuate such policies in an infinite variety of specific situations, it may meet the difficulties by leaving the adaptation of means to an end to the administrative agency, which thereupon has the power and the responsibility of exercising its judgment in employing the statutory remedies. Such legislation does not create rights to be vindicated according to a rigid scheme of remedies, but entrusts to an agency the maintenance and promotion of the statutory policies. The reviewing court may require only that the statute speak through the agency where the statute does not speak for itself. *Phelps Dodge Corp. v. National Labor Relations Board* (1941) 313 U. S. 177, 85 L. Ed. 1271, 61 S. Ct. 845, 133 A. L. R. 1217.

Secretary of Agriculture. *Midwest Farmers, Inc. v. United States* (D. C. D. Minn., 1945) 64 F. Supp. 91.

Securities and Exchange Commission. In re *Standard Gas & Electric Co.* (C. C. A. 3rd, 1945) 151 F. (2d) 326, quoting this section, *vom Baur*, Federal Administrative Law.

p. 253, n. 6a. See the cases cited in note 5. See also §§ 437, 438 and 540.

SUBDIVISION III

EXTENT AND SCOPE OF JUDICIAL REVIEW ON ADMINISTRATIVE DECISIONS OF CONSTITUTIONAL QUESTIONS

§ 261. Introduction.

p. 254, n. 7. *Davies Warehouse Co. v. Bowles* (1944) 321 U. S. 144, 88 L. Ed. 635, 64 S. Ct. 474.

CHAPTER 20

RIGHT TO TRIAL DE NOVO

§ 262. Constitutional Questions Must Be Tried De Novo.

The judicial power must decide *de novo* whether certain property constitutes an "import" so as to prohibit the exercise of state powers of taxation over such property. The entire question of the constitutional power of the state depends upon that determination, in view of Article I, section 10, clause 2 of the Constitution, and accordingly the doctrine of administrative finality is not applicable to the determination of the state administrative agency. *Hooven & Allison Co. v. Evatt* (1945) 324 U. S. 652, 89 L. Ed. 1252, 65 S. Ct. 870.

Administrative Procedure Act. The Administrative Procedure Act, Sec. 12, provides that: "Nothing in this Act shall be held to diminish the constitutional rights of any person or to limit or repeal additional requirements imposed by statute or otherwise recognized by law."

p. 256, n. 1. Administrative Procedure Act, Sec. 10(e). See also Sec. 5 of that Act. *Hooven & Allison Co. v. Evatt* (1945) 324 U. S. 652, 89 L. Ed. 1252, 65 S. Ct. 870; *Gudmundson v. Cardillo* (App. D. C., 1942) 126 F. (2d) 521.

p. 258, n. 11. *Gudmundson v. Cardillo* (App. D. C., 1942) 126 F. (2d) 521.

p. 258, n. 14. *Hooven & Allison Co. v. Evatt* (1945) 324 U. S. 652, 89 L. Ed. 1252, 65 S. Ct. 870.

§ 263. Constitutional Basis for the Rule.

p. 259, n. 24. See Mr. Justice Murphy concurring in *Estep v. United States* (1946) 327 U. S. 114, 90 L. Ed. 567, 66 S. Ct. 423.

p. 261, n. 27. *Espino v. Wixon* (C. C. A. 9th, 1943) 136 F. (2d) 96.

§ 264. Extent of the Right.

p. 261, n. 28. Administrative Procedure Act. See the Administrative Procedure Act, Sec. 10(e).

Federal Communications Commission. *National Broadcasting Co., Inc. v. United States* (1943) 319 U. S. 190, 87 L. Ed. 1344, 63 S. Ct. 997.

State Agencies. *Hooven & Allison Co. v. Evatt* (1945) 324 U. S. 652, 89 L. Ed. 1252, 65 S. Ct. 870.

Workmen's Compensation Cases. Gudmundson v. Cardillo (App. D. C., 1942) 126 F. (2d) 521.

§ 265. Questions of Constitutional Jurisdiction and Power.

§ 266. — Compensation Cases: Constitutional Jurisdiction and Power of Congress to Impose Liability Without Fault.

Where the constitutional limitations inherent in the administration of the maritime jurisdiction are lacking, as where the District of Columbia Compensation Law is involved, no trial *de novo* is required and the substantial evidence rule is applicable. Gudmundson v. Cardillo (App. D. C., 1942) 126 F. (2d) 521. See also § 575 et seq.

p. 264, n. 43. Ford v. Parker (D. C. D. Md., 1943) 52 F. Supp. 98. See Marshall v. Pletz (1943) 317 U. S. 383, 87 L. Ed. 348, 63 S. Ct. 284.

p. 264, n. 44. Gudmundson v. Cardillo (App. D. C., 1942) 126 F. (2d) 521; Ford v. Parker (D. C. D. Md., 1943) 52 F. Supp. 98; Tucker v. Norton (D. C. E. D. Penn., 1943) 49 F. Supp. 483.

p. 264, n. 45. Tucker v. Norton (D. C. E. D. Penn., 1943) 49 F. Supp. 483.

§ 267. — Military Cases: Constitutional Jurisdiction of Officer: Allegation of No Enlistment.

p. 265, n. 46. Under the Selective Training and Service Act of 1940, jurisdiction of the Military depends upon induction rather than enlistment. The issue as to whether induction has occurred is a jurisdictional question of fact which may likewise be tried *de novo* by a civil court to determine jurisdiction. Ex parte Billings (D. C. Kan., 1942) 45 F. Supp. 663. Likewise, where induction of a minor is claimed to have been appropriately nullified by application for his release, this question may also be determined *de novo* by the court. Ex parte McCollom (D. C. N. J., 1942) 45 F. Supp. 759.

p. 265, n. 47. See Nordmann v. Woodring (W. D. Okla., 1939) 28 F. Supp. 573.

§ 269. — Citizenship Cases.

p. 267, n. 56. Espino v. Wixon (C. C. A. 9th, 1943) 136 F. (2d) 96.

p. 268, n. 57. Espino v. Wixon (C. C. A. 9th, 1943) 136 F. (2d) 96.

p. 268, n. 58. Espino v. Wixon (C. C. A. 9th, 1943) 136 F. (2d) 96.

p. 268, n. 59. Espino v. Wixon (C. C. A. 9th, 1943) 136 F. (2d) 96.

p. 268, n. 60. Some consider that the right to a trial *de novo* on the question of citizenship, while available to a citizen already in the country, is not available to one returning from abroad. See note, "Exclusion of Alien Claiming Citizenship" (1937) 5 George Washington L. Rev. 905. However, under the language in Kessler v. Strecker (1940) 307 U. S. 22, 83 L. Ed. 1082, 59 S. Ct. 694, and from the broader standpoint of protection of constitutional rights by the judicial power under the supremacy of law, a trial *de novo* would appear to be available to citizens under either circumstance provided the claim of citizenship is not a bare assertion. The factor of transportation would not appear to be relevant to the legal principles involved. See §§ 3, 41.

§ 270A. Questions of Constitutional Right.

§ 270B. (New) — Constitutional Power of the States.

The judicial power must similarly reach its own independent judgment on the facts where the question involved is the constitutional power of a state rather than the power of Congress, regardless of

the fact that there have been extensive state administrative proceedings and a state administrative determination. The doctrine of administrative finality is inapplicable. *Hooven & Allison Co. v. Evatt* (1945) 324 U. S. 652, 89 L. Ed. 1252, 65 S. Ct. 870.

§ 271. — Confiscation Cases: Due Process.

p. 269, n. 66. See *Market St. Ry. Co. v. Railroad Commission of State of California* (1945) 324 U. S. 548, 89 L. Ed. 1171, 65 S. Ct. 770.

§ 272A. (New) — Condemnation Cases: Taking for "Public Use."

The question of what is a "public use" in cases of taking by eminent domain is a judicial one. The decision of Congress on the point, however, is entitled to deference until shown to be an impossibility. *United States ex rel. Tennessee Valley Authority v. Welch* (1946) 327 U. S. 546, 90 L. Ed. 843, 66 S. Ct. 715.

CHAPTER 21

PROCEDURAL DUE PROCESS

I. PROCEDURAL DUE PROCESS IN ADMINISTRATIVE PROCEEDINGS

A. *In General*

§ 273A. (New) Introduction.

The requirements of procedural due process for statutes setting up administrative schemes are discussed in § 38 et seq. This chapter discusses procedural due process as applied to administrative proceedings pursuant to statute and to judicial review proceedings.

§ 274. General Aspects of Procedural Due Process.

That there are natural, inherent and fundamental requirements of fairness essential to the very concept of justice is a principle which is likewise applied broadly to procedure in criminal cases under the due process clause. *Betts v. Brady* (1942) 316 U. S. 455, 86 L. Ed. 1595, 62 S. Ct. 1252; *Hysler v. Florida* (1942) 315 U. S. 411, 316 U. S. 642, 86 L. Ed. 932, 1774, 62 S. Ct. 688.

p. 274, n. 4. *Market St. Ry. Co. v. Railroad Commission of State of California* (1945) 324 U. S. 548, 89 L. Ed. 1171, 65 S. Ct. 770; *National Labor Relations Board v. Yale & Towne Mfg. Co.* (C. C. A. 2d, 1940) 114 F. (2d) 376. See *Wallace Corp. v. National Labor Relations Board* (1944) 323 U. S. 248, 89 L. Ed. 216, 65 S. Ct. 238.

p. 274, n. 6. *Yakus v. United States* (1944) 321 U. S. 414, 88 L. Ed. 834, 64 S. Ct. 660. See *Market St. Ry. Co. v. Railroad Commission of State of California* (1945) 324 U. S. 548, 89 L. Ed. 1171, 65 S. Ct. 770.

p. 274, n. 8. *Powhatan Mining Co. v. Ickes* (C. C. A. 6th, 1941) 118 F. (2d) 105.

§ 276. Administrative Proceedings Which Are Subject to the Requirements: Adversary Proceedings.

Where there is no administrative question to be determined, as where the facts involved are admitted or undisputed, it has been held that there is no right to a hearing. *United States ex rel. Vounas v. Hughes* (C. C. A. 3rd, 1940) 116 F. (2d) 171. But see § 300.

p. 276, n. 15. *National Labor Relations Board v. National Mineral Co.* (C. C. A. 7th, 1943) 134 F. (2d) 424, cert. den. 320 U. S. 753, 88 L. Ed. 448, 64 S. Ct. 58.

A proceeding is of an adversary character if it presupposes attendance at a judicial or quasi-judicial proceeding and the forfeiture of some right for failure to attend. *May Department Stores v. Brown* (D. C. W. D. Mo., 1945) 60 F. Supp. 735.

p. 276, n. 16. *National Labor Relations Board v. T. W. Phillips Gas & Oil Co.* (C. C. A. 3rd, 1944) 141 F. (2d) 304; *Powhatan Mining Co. v. Ickes* (C. C. A. 6th, 1941) 118 F. (2d) 105. See *Noble v. United States* (D. C. Minn., 1942) 45 F. Supp. 793.

p. 277, n. 17. See *Republic Aviation Corp. v. National Labor Relations Board* (1945) 324 U. S. 793, 89 L. Ed. 1372, 65 S. Ct. 982.

p. 277, n. 18. *Powhatan Mining Co. v. Ickes* (C. C. A. 6th, 1941) 118 F. (2d) 105.

§ 277. — Inherent Requisites of Quasi-Judicial Proceedings.

p. 277, n. 19. See *Republic Aviation Corp. v. National Labor Relations Board* (1945) 324 U. S. 793, 89 L. Ed. 1372, 65 S. Ct. 982.

p. 277, n. 22. *Walker v. Popenoe* (App. D. C., 1945) 149 F. (2d) 511.

§ 278. General Compliance with the Requirements.

When a full and fair hearing is given on judicial review, with a complete re-examination of the evidence, the requirements of procedural due process are satisfied and defects of the prior administrative proceedings cured. *Carter v. Kubler* (1943) 320 U. S. 243, 88 L. Ed. 26, 64 S. Ct. 1.

Due process does not require condemnation of land to be in advance of its occupation by the condemning authority, where the owner has opportunity in the course of the condemnation proceedings to be heard and offer evidence as to the value of the land when taken. *Bailey v. Anderson* (1945) 326 U. S. 203, 90 L. Ed. 3, 66 S. Ct. 66.

§ 279. — Rules of Evidence Need Not Control.

p. 281, n. 36. See also §§ 166 and 579. *Berkshire Knitting Mills v. National Labor Relations Board* (C. C. A. 3rd, 1943) 139 F. (2d) 134, cert. den. 322 U. S. 747, 88 L. Ed. 1579, 64 S. Ct. 1158; *Louisville Gas & Electric Co. v. Federal Power Commission* (C. C. A. 6th, 1942) 129 F. (2d) 126, cert. den. 313 U. S. 761, 87 L. Ed. 1133, 63 S. Ct. 559. See *Wallace Corp. v. National Labor Relations Board* (1944) 323 U. S. 248, 89 L. Ed. 216, 65 S. Ct. 238.

*B. Fair Hearing***§ 281. Fair Hearing: Prime Requisite of Adversary Proceedings.**

The constitutional requirement of a fair hearing has been recognized by Congress in enacting the National Labor Relations Act, 49 Stat. 453, 29 USC 159(c), by requiring the Board to provide an

"appropriate hearing upon due notice" in an investigation covering the representation of employees. *Inland Empire District Council, L. S. W. U. v. Milles* (1945) 325 U. S. 697, 89 L. Ed. 1877, 65 S. Ct. 1316.

Administrative findings that a fair hearing was granted by the trial examiner are entitled to weight and are not lightly to be disturbed, but they are not conclusive. See § 425c.

p. 281, n. 38. **Alien Cases.** *Espino v. Wixon* (C. C. A. 9th, 1943) 136 F. (2d) 96; *O'Connell v. Ward* (C. C. A. 1st, 1942) 126 F. (2d) 615; *United States ex rel. Brandt v. District Director of Immigration* (D. C. S. D. N. Y., 1941) 40 F. Supp. 371. See *Bridges v. Wixon* (1945) 326 U. S. 135, 89 L. Ed. 2103, 65 S. Ct. 1443.

Bankruptcy Conciliation Commissioners. See *Carter v. Kubler* (1943) 320 U. S. 243, 88 L. Ed. 26, 64 S. Ct. 1.

Federal Communications Commission. See *Ashbacker Radio Corp. v. Federal Communications Commission* (1945) 326 U. S. 327, 90 L. Ed. 108, 66 S. Ct. 148.

Federal Power Commission. *Alabama Power Co. v. Federal Power Commission* (C. C. A. 5th, 1943) 136 F. (2d) 929.

Interstate Commerce Commission. *Kline v. United States* (D. C. D. Neb., Omaha Div., 1941) 41 F. Supp. 577.

National Labor Relations Board. *National Labor Relations Board v. Western Cartridge Co.* (C. C. A. 2d, 1943) 138 F. (2d) 551, cert. den. 321 U. S. 786, 88 L. Ed. 1077, 64 S. Ct. 780; *National Labor Relations Board v. Phelps* (C. C. A. 5th, 1943) 136 F. (2d) 562; *Donnelly Garment Co. v. National Labor Relations Board* (C. C. A. 8th, 1941) 123 F. (2d) 215; *National Labor Relations Board v. Newberry Lumber & Chemical Co.* (C. C. A. 6th, 1941) 123 F. (2d) 831.

Postmaster General. *Walker v. Popenoe* (App. D. C., 1945) 149 F. (2d) 511. See note, "Administrative Hearings in Postal Fraud Order Proceedings" (1941) 50 *Yale L. J.* 1479.

Secretary of Agriculture. *Midwest Farmers, Inc. v. United States* (D. C. D. Minn., 1945) 64 F. Supp. 91.

Secretary of the Interior. *Ickes v. Underwood* (App. D. C., 1944) 141 F. (2d) 546, cert. den. 323 U. S. 713, 89 L. Ed. 574, 65 S. Ct. 39; *Powhatan Mining Co. v. Ickes* (C. C. A. 6th, 1941) 118 F. (2d) 105.

Securities and Exchange Commission. See *Phillips v. Securities & Exchange Commission* (C. C. A. 2d, 1946) 153 F. (2d) 27 and *American Gas & Electric Co. v. Securities & Exchange Commission* (App. D. C., 1943) 134 F. (2d) 633, cert. den. 319 U. S. 763, 87 L. Ed. 1713, 63 S. Ct. 1318.

Selective Service Boards. *Graf v. Mallon* (C. C. A. 8th, 1943) 138 F. (2d) 230; *Rase v. United States* (C. C. A. 6th, 1942) 129 F. (2d) 126; *United States ex rel. Cameron v. Embrey* (D. C. Md., 1942) 46 F. Supp. 916; *United States ex rel. Errichetti v. Baird* (D. C. E. D. N. Y., 1941) 39 F. Supp. 388.

Social Security Board. *Walker v. Altmeyer* (C. C. A. 2d, 1943) 137 F. (2d) 531.

State Agencies. See *Market St. Ry. Co. v. Railroad Commission of State of California* (1945) 324 U. S. 548, 89 L. Ed. 1171, 65 S. Ct. 770.

A municipal ordinance which fixes rates, without affording a hearing for the period in question, is invalid. *City of El Paso v. Texas Cities Gas Co.* (C. C. A. 5th, 1938) 100 F. (2d) 501, cert. den. 306 U. S. 650, 83 L. Ed. 1049, 59 S. Ct. 592, rehearing den. 306 U. S. 669, 83 L. Ed. 1063, 59 S. Ct. 643; *United Gas Corp. v. City of Monroe* (D. C. La., 1942) 46 F. Supp. 45.

p. 282, n. 39. *National Labor Relations Board v. Phelps* (C. C. A. 5th, 1943) 136 F. (2d) 562.

p. 283, n. 40. **Price Administrator.** *Weinstein v. Bowles* (D. C. D. Mass., 1945) 62 F. Supp. 455.

Securities and Exchange Commission. *Public Service Corp. of New Jersey v. Securities & Exchange Commission* (C. C. A. 3rd, 1942) 129 F. (2d) 899, cert. den. 317 U. S. 691, 87 L. Ed. 553, 63 S. Ct. 266.

National Labor Relations Board. *National Labor Relations Board v. Baldwin Locomotive Works* (C. C. A. 3rd, 1942) 128 F. (2d) 39; *National Labor Relations Board v. Ed. Friedrich, Inc.* (C. C. A. 5th, 1940) 116 F. (2d) 883;

National Labor Relations Board v. Yale & Towne Mfg. Co. (C. C. A. 2d, 1940) 114 F. (2d) 376.

p. 285, n. 55. United States ex rel. Brandt v. District Director of Immigration (D. C. S. D. N. Y., 1941) 40 F. Supp. 371. See note 38.

Perhaps more meticulous care must be exercised to accord a fair hearing in deportation cases than in other administrative proceedings. *Bridges v. Wixon* (1945) 326 U. S. 135, 89 L. Ed. 2103, 65 S. Ct. 1443. See also § 708. However, under the supremacy of law it would seem that all legal rights should stand on the same footing as a basis for a hearing. See note 38, and §§ 3, 41.

§ 282. Requirements of Fair Hearing in General.

Where two bona fide applications for licenses or permits are mutually exclusive, the grant of one without a hearing to both improperly deprives the loser of the hearing to which he is entitled. *Ashbacker Radio Corp. v. Federal Communications Commission* (1945) 326 U. S. 327, 90 L. Ed. 108, 66 S. Ct. 148.

It has been held that where considerations of administrative expediency weigh heavily, and where opportunity for a full and fair hearing is available within the administrative process, no fundamental rights are transgressed when the hearing follows, rather than precedes, the action of the administrative agency. *United States v. Wood* (D. C. D. Mass., 1945) 61 F. Supp. 175. But see *City of El Paso v. Texas Cities Gas Co.* (C. C. A. 5th, 1938) 100 F. (2d) 501, cert. den. 306 U. S. 650, 83 L. Ed. 1049, 59 S. Ct. 592.

The rules of an administrative agency should be designed to protect parties to its proceedings and to afford due process of law. *Bridges v. Wixon* (1945) 326 U. S. 135, 89 L. Ed. 2103, 65 S. Ct. 1443.

A party to an administrative proceeding is entitled to insist on the observance of the rules of the agency promulgated pursuant to law. *Bridges v. Wixon* (1945) 326 U. S. 135, 89 L. Ed. 2103, 65 S. Ct. 1443. See also § 252A.

Where all relevant facts may be fully submitted in written form, denial of an oral hearing is not an abuse of the agency's discretion. The courts will only interfere with the agency's decision where an abuse of its discretion plainly appears. *Mortgage Underwriting & Realty Co. v. Bowles* (Em. App., 1945) 150 F. (2d) 411; *Bailey Farm Dairy Co. v. Jones* (D. C. E. D. Mo., 1945) 61 F. Supp. 209.

The parties to a hearing are entitled to be furnished copies of the findings of fact and order made by the agency after hearing. *Bowles v. Baer* (C. C. A. 7th, 1944) 142 F. (2d) 787; *National Labor Relations Board v. J. G. Boswell Co.* (C. C. A. 9th, 1943) 136 F. (2d) 585.

The interest of a party may be such that the fair hearing requirement is met by allowing him only limited participation in the proceedings. *Okin v. Securities & Exchange Commission* (C. C. A. 2d, 1943) 137 F. (2d) 398.

There is no denial of due process where an agency, after entering an order setting aside the examiner's report, later vacates the order and reinstates the report, without notice and hearing. A full hearing was given on the previous occasion. *F. W. Woolworth Co. v. National Labor Relations Board* (C. C. A. 2d, 1941) 121 F. (2d) 658.

A change in the normal order of presentation of a case is not necessarily a denial of a fair hearing. *California Lumbermen's Council*

v. Federal Trade Commission (C. C. A. 9th, 1940) 115 F. (2d) 178, cert. den. 312 U. S. 709, 85 L. Ed. 1141, 61 S. Ct. 827. See also § 150A.

Administrative agencies have a very wide latitude in deciding in what order to take up the issues in any litigation. *W. R. Grace & Co. v. Civil Aeronautics Board* (C. C. A. 2d, 1946) 154 F. (2d) 271. See also § 150A.

Pre-hearing conferences between an agency and corporation on details involved in a holding-company simplification do not constitute an *ex parte* adjudication or denial of a fair hearing to stockholders of the corporation. *Phillips v. Securities & Exchange Commission* (C. C. A. 2d, 1946) 153 F. (2d) 27.

The Constitution does not guarantee one the right to select his own tribunal or his own method of procedure. *Dodez v. United States* (C. C. A. 6th, 1946) 154 F. (2d) 637.

Under the Food, Drug and Cosmetic Act, the Federal Security Administrator is required to hold a "public hearing" at which "any interested person may be heard" before issuing or amending a regulation. *Federal Security Administrator v. Quaker Oats Co.* (1943) 318 U. S. 218, 87 L. Ed. 724, 63 S. Ct. 589.

p. 285, n. 58. See *Vinson v. Washington Gas Light Co.* (1944) 321 U. S. 489, 88 L. Ed. 883, 64 S. Ct. 731.

p. 286, n. 59. See *Vinson v. Washington Gas Light Co.* (1944) 321 U. S. 489, 88 L. Ed. 883, 64 S. Ct. 731.

p. 287, n. 66. *National Labor Relations Board v. Newberry Lumber & Chemical Co.* (C. C. A. 6th, 1941) 123 F. (2d) 831.

§ 283. Delay in Commencement of Hearing.

p. 288, n. 70. See *Berkshire Employees Ass'n of Berkshire Knitting Mills v. National Labor Relations Board* (C. C. A. 3rd, 1941) 121 F. (2d) 235.

§ 283A. (New) Delay in Making Determination.

A substantial delay in the making of an administrative determination, while regrettable, does not invalidate the determination where it is not arbitrary, the result of deliberate discrimination, or, in view of the magnitude of the agency's task, unreasonable. *Gregg Cartage & Storage Co. v. United States* (1942) 316 U. S. 74, 86 L. Ed. 1283, 62 S. Ct. 932. See also *Bailey v. Anderson* (1945) 326 U. S. 203, 90 L. Ed. 3, 66 S. Ct. 66.

The delay occasioned by protracted hearings involving weeks of testimony, hundreds of pages of record, and innumerable motions, exceptions and the like, and one appeal, cannot be called lack of due process of law. *Berkshire Knitting Mills v. National Labor Relations Board* (C. C. A. 3rd, 1943) 139 F. (2d) 134, cert. den. 322 U. S. 747, 88 L. Ed. 1579, 64 S. Ct. 1158.

An administrative agency may be compelled to take action within a reasonable time. See § 689.

§ 285. Presence of Counsel or Aide.

An administrative agency may exclude counsel from hearings for contemptuous conduct. *National Labor Relations Board v. Weirton Steel Co.* (C. C. A. 3rd, 1943) 135 F. (2d) 494.

p. 288, n. 74. **Administrative Procedure Act.** "SEC. 6. Except as otherwise provided in this Act—

"(a) **APPEARANCE.**—Any person compelled to appear in person before any agency or representative thereof shall be accorded the right to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. Every party shall be accorded the right to appear in person or by or with counsel or other duly qualified representative in any agency proceeding. So far as the orderly conduct of public business permits, any interested person may appear before any agency or its responsible officers or employees for the presentation, adjustment, or determination of any issue, request, or controversy in any proceeding (interlocutory, summary, or otherwise) or in connection with any agency function. Every agency shall proceed with reasonable dispatch to conclude any matter presented to it except that due regard shall be had for the convenience and necessity of the parties or their representatives. Nothing herein shall be construed either to grant or to deny to any person who is not a lawyer the right to appear for or represent others before any agency or in any agency proceeding."

Price Administrator. See *Bowles v. Baer* (C. C. A. 7th, 1944) 142 F. (2d) 787.

Selective Service Boards. *United States v. Pitt* (C. A. A. 3rd, 1944) 144 F. (2d) 169. But see *Harris v. Ross* (C. C. A. 5th, 1944) 146 F. (2d) 355 and *Lehr v. United States* (C. C. A. 5th, 1943) 139 F. (2d) 919.

§ 286. Limitation of Right to Fair Hearing.

Where an appellate administrative agency has determined the facts *de novo*, the point that the lower agency failed to afford a fair hearing does not impair the determination. *Bowles v. United States* (1943) 319 U. S. 33, 87 L. Ed. 1194, 63 S. Ct. 912, rehearing den. 319 U. S. 785, 87 L. Ed. 1728, 63 S. Ct. 1323. See § 45.

§ 287. Fair Hearing: Test Is Whole Record.

p. 290, n. 85. *Okin v. Securities & Exchange Commission* (C. C. A. 2d, 1943) 137 F. (2d) 398.

§ 288. Administrative Agency May Not Compromise with Requirement of Fair Hearing.

p. 291, n. 88. *National Labor Relations Board v. Phelps* (C. C. A. 5th, 1943) 136 F. (2d) 562. See *Ashbacker Radio Corp. v. Federal Communications Commission* (1945) 326 U. S. 327, 90 L. Ed. 108, 66 S. Ct. 148.

§ 289. Court Will Not Probe Mental Processes of Agency if Required Fair Hearing Given.

p. 292, n. 93. *National Labor Relations Board v. Baldwin Locomotive Works* (C. C. A. 3rd, 1942) 128 F. (2d) 39; *National Labor Relations Board v. Air Associates* (C. C. A. 2d, 1941) 121 F. (2d) 586.

p. 292, n. 94. *Kline v. United States* (D. C. D. Neb., Omaha Div., 1941) 41 F. Supp. 577.

§ 289A. (New) Claim of Denial of Fair Hearing Must Be Proven in Court.

A reviewing court cannot presume that a fair hearing has been denied where the party aggrieved did not embrace his opportunity to prove his grievance in the reviewing court. For instance, where a railroad, after receiving the report of a division of the Interstate Commerce Commission, filed a petition for reconsideration, but did

not put it in evidence before the reviewing court, the court could not know the basis of the railroad's claim of denial of a fair hearing, and would not presume that the right had been substantially denied. *Chicago, St. P., M. & O. Ry. Co. v. United States* (1944) 327 U. S. 1, 88 L. Ed. 1093, 64 S. Ct. 842.

1. Right to Know and Meet Opposing Claims

§ 290. A Fundamental Right.

The Supreme Court will not consider for the first time whether on the facts a tax liability may have been incurred on a theory not advanced before the Board of Tax Appeals, and one which was not within the issues as framed by the Commissioner of Internal Revenue. *Helvering v. Cement Investors* (1942) 316 U. S. 527, 86 L. Ed. 1649, 62 S. Ct. 1125. See §§ 238 and 239.

p. 292, n. 96. *Bankruptcy Conciliation Commissioners*. *Carter v. Kubler* (1943) 320 U. S. 243, 88 L. Ed. 26, 64 S. Ct. 1.

Federal Power Commission. *Alabama Power Co. v. Federal Power Commission* (C. C. A. 5th, 1943) 136 F. (2d) 929.

Federal Trade Commission. *E. B. Muller & Co. v. Federal Trade Commission* (C. C. A. 6th, 1944) 142 F. (2d) 511.

Interstate Commerce Commission. See *United States v. Pierce Auto Freight Lines, Inc.* (1946) 327 U. S. 515, 90 L. Ed. 821, 66 S. Ct. 687.

National Labor Relations Board. *National Labor Relations Board v. Air Associates* (C. C. A. 2d, 1941) 121 F. (2d) 586. See *National Labor Relations Board v. Grieder Machine Tool & Die Co.* (C. C. A. 6th, 1944) 142 F. (2d) 163, cert. den. 323 U. S. 724, 89 L. Ed. 582, 65 S. Ct. 56 and *Berkshire Knitting Mills v. National Labor Relations Board* (C. C. A. 3rd, 1943) 139 F. (2d) 134, cert. den. 322 U. S. 747, 88 L. Ed. 1579, 64 S. Ct. 1158.

Selective Service Boards. See *United States v. Bowen* (D. C. Del., 1942) 45 F. Supp. 301.

Tax Court. *Commissioner of Internal Revenue v. West Production Co.* (C. C. A. 5th, 1941) 121 F. (2d) 9, cert. den. 314 U. S. 682, 86 L. Ed. 546, 62 S. Ct. 186. See *Helvering v. Cement Investors* (1942) 316 U. S. 527, 86 L. Ed. 1649, 62 S. Ct. 1125.

Law Review Note. See note, "Aftermath of the Morgan Decisions" (1940) 25 Iowa L. Rev. 622.

p. 293, n. 1. *Public Service Corp. of New Jersey v. Securities & Exchange Commission* (C. C. A. 3rd, 1942) 129 F. (2d) 899, cert. den. 317 U. S. 691, 87 L. Ed. 553, 63 S. Ct. 266.

p. 293, n. 2. The mere filing of applications in related proceedings may provide sufficient opportunity to know and meet opposing claims. *United States v. Pierce Auto Freight Lines, Inc.* (1946) 327 U. S. 515, 90 L. Ed. 821, 66 S. Ct. 687.

p. 293, n. 3. *National Labor Relations Board v. Grieder Machine Tool & Die Co.* (C. C. A. 6th, 1944) 142 F. (2d) 163, cert. den. 323 U. S. 724, 89 L. Ed. 582, 65 S. Ct. 56.

p. 294, n. 4. An exhibit introduced into evidence before an agency and accepted by it for a single purpose only cannot be used by the Board for an independent and unrelated purpose. *National Labor Relations Board v. Lightner Pub. Corp. of Illinois* (C. C. A. 7th, 1940) 113 F. (2d) 621.

§ 291. Preliminary Stages: Right to Notice of Hearing.

Whether actual notice was had before an informal hearing was held was immaterial when the applicant had an opportunity to protest the resulting compliance order by a brief and supporting infor-

mation. *Crescent Express Lines v. U. S.*, 320 U. S. 401, 88 L. Ed. 127, 64 S. Ct. 167 (1943).

Administrative Procedure Act. "(a) NOTICE.—Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place, and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted. In instances in which private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the times and places for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

"(b) PROCEDURE.—The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 7 and 8. (Administrative Procedure Act, Sec. 5(a) and (b).)

p. 294, n. 7. *Opp Cotton Mills, Inc. v. Administrator of Wage & Hour Division* (1941) 312 U. S. 126, 85 L. Ed. 624, 61 S. Ct. 524; *Ickes v. Underwood* (App. D. C., 1944) 141 F. (2d) 546, cert. den. 323 U. S. 713, 89 L. Ed. 574, 65 S. Ct. 39; *Weinstein v. Bowles* (D. C. D. Mass., 1945) 62 F. Supp. 455.

§ 292. Persons Entitled to Notice.

One who appears in an administrative proceeding may not complain of insufficiency of notice to other parties thereto. *Peoria Tribe of Indians v. Wea Townsite Co.* (C. C. A. 10th, 1941) 117 F. (2d) 940.

Under the Railway Labor Act, "due notice" must be given to the employee or employees involved in disputes before the Railroad Adjustment Board. Notice to the union representative is not enough to meet this requirement. *Elgin, J. & E. Ry. Co. v. Burley* (1946) 327 U. S. 661, 90 L. Ed. 928, 66 S. Ct. 721.

p. 296, n. 20. *Solvay Process Co. v. National Labor Relations Board* (C. C. A. 5th, 1941) 117 F. (2d) 83, cert. den. 313 U. S. 596, 85 L. Ed. 1549, 61 S. Ct. 1121.

p. 297, n. 23. *Solvay Process Co. v. National Labor Relations Board* (C. C. A. 5th, 1941) 117 F. (2d) 83, cert. den. 313 U. S. 596, 85 L. Ed. 1549, 61 S. Ct. 1121.

§ 293. How Notice May Be Given.

p. 297, n. 26. *Opp Cotton Mills, Inc. v. Administrator of Wage & Hour Division* (1941) 312 U. S. 126, 85 L. Ed. 624, 61 S. Ct. 524.

§ 294. Adequate Notice.

A general appearance in an administrative proceeding cures defects in the service of notice, or waives lack of notice, as with a general appearance in a judicial proceeding. *Peoria Tribe or Band of Indians v. Wea Townsite Co.* (C. C. A. 10th, 1941) 117 F. (2d) 940; *California Lumbermen's Council v. Federal Trade Commission* (C. C. A.

9th, 1940) 115 F. (2d) 178, cert. den. 312 U. S. 709, 85 L. Ed. 1141, 61 S. Ct. 827.

"Due notice" under the Railway Labor Act would require at least knowledge on the aggrieved employee's part of the pendency of the proceedings or knowledge of such facts as would be sufficient to put him on notice of their pendency. The employee cannot stand by with knowledge of what is going on with reference to his claim, and when matters have been brought to a conclusion, assert his rights for the first time. *Elgin, J. & E. Ry. Co. v. Burley* (1946) 327 U. S. 661, 90 L. Ed. 928, 66 S. Ct. 721.

Adequate notice is not provided where a party first learns of contentions made by the agency from its brief, filed after the hearing. *Alabama Power Co. v. Federal Power Commission* (C. C. A. 5th, 1943) 136 F. (2d) 929. See also §§ 238 and 239.

p. 298, n. 31. *Opp Cotton Mills, Inc. v. Administrator of Wage & Hour Division* (1941) 312 U. S. 126, 85 L. Ed. 624, 61 S. Ct. 524. See *National Labor Relations Board v. Yale & Towne Mfg. Co.* (C. C. A. 2d, 1940) 114 F. (2d) 376.

§ 295. — Reasonable Time.

The granting of continuances is ordinarily a matter within the discretion of the administrative agency. *Chiquita Mining Co. v. Commissioner of Internal Revenue* (C. C. A. 9th, 1945) 148 F. (2d) 306. See §§ 150A and 174.

p. 300, n. 47. See *Associated Laboratories v. Federal Trade Commission* (C. C. A. 2d, 1945) 150 F. (2d) 629.

§ 296. Later Stages of Administrative Proceedings.

p. 300, n. 52. See *National Labor Relations Board v. Pacific Gas & Electric Co.* (C. C. A. 9th, 1941) 118 F. (2d) 780; *National Labor Relations Board v. Yale & Towne Mfg. Co.* (C. C. A. 2d, 1940) 114 F. (2d) 376.

§ 297. — Right to Notice and Examination of Opposing Evidence.

The refusal to produce a document in an administrative proceeding is not a ground for invalidating the administrative order where the court holds the document not to be material and the examiner directs that it be filed as a "late exhibit" in the administrative proceeding. *Interstate Commerce Commission v. Parker* (1945) 326 U. S. 60, 89 L. Ed. 2051, 65 S. Ct. 1490.

Mere misapprehension by a litigant of the steps its best interests require during a trial is not ground for judicial interference as a denial of constitutional rights. Thus where an administrative agency in a proceeding to investigate reasonableness of rates used the price for which the utility had offered to sell its property as a rate base and evidence of such offer was received without limitation or statement of its purpose and the utility was not misled, entrapped or lulled into security, there was no denial of due process simply because the grounds of the agency's determination were unexpected. *Market St. Ry. Co. v. Railroad Commission of State of California* (1945) 324 U. S. 548, 89 L. Ed. 1171, 65 S. Ct. 770.

p. 301, n. 55. See *Wright v. Securities & Exchange Commission* (C. C. A. 2d, 1943) 134 F. (2d) 733; *United States v. Bowen* (D. C. Del. 1942) 45 F. Supp. 301.

p. 302, n. 59. *United States v. Cain* (C. C. A. 2d, 1945) 149 F. (2d) 338; *United States v. Mallon* (D. C. D. Md., 1945) 61 F. Supp. 671. See *Powhatan Mining Co. v. Ickes* (C. C. A. 6th, 1941) 118 F. (2d) 105; *United States v. Bowen* (D. C. Del., 1942) 45 F. Supp. 301.

§ 298. — Right to Examiner's Proposed Report or Proposed Findings.

p. 302, n. 64. *Public Service Corp. of New Jersey v. Securities & Exchange Commission* (C. C. A. 3rd, 1942) 129 F. (2d) 899, cert. den. 317 U. S. 691, 87 L. Ed. 553, 63 S. Ct. 266; *Peoria Braumeister Co. v. Yellowley* (C. C. A. 7th, 1941) 123 F. (2d) 637.

§ 300. — Right to Argument.

p. 305, n. 78. *Administrative Procedure Act*. See the *Administrative Procedure Act*, Sec. 8(b), which provides specifically for the submission of argument in connection with proposed findings and exceptions to decisions of subordinates.

§ 300A. (New) Right to Open and Close.

The right to a fair hearing does not involve the right to open or to close the case, as there is no requirement that a petitioner's case be presented after the government's. *California Lumbermen's Council v. Federal Trade Commission* (C. C. A. 9th, 1940), 115 F. (2d) 178, cert. den. 312 U. S. 709, 85 L. Ed. 1141, 61 S. Ct. 827. See, however, the *Administrative Procedure Act*, Sec. 7(c).

2. Presumptions

§ 301. In General.

The validity of a presumption established by an administrative agency through the promulgation of a regulation or otherwise, as with a statutory presumption, depends upon the rationality between what is proved and what is inferred. **Republic Aviation Corp. v. National Labor Relations Board* (1945) 324 U. S. 793, 89 L. Ed. 1372, 65 S. Ct. 982. Within these limits an administrative agency may apparently select and establish for its proceedings any presumption which contains such rational relationship. On this theory a presumption established by an administrative agency to the effect that the promulgation and enforcement by an employer of a rule prohibiting union solicitation by an employee, outside of working hours, although on company property, will be presumed to be an unfair labor practice in the absence of evidence of special circumstances, was held valid. *Republic Aviation Corp. v. National Labor Relations Board* (1945) 324 U. S. 793, 89 L. Ed. 1372, 65 S. Ct. 982.

3. Burden of Proof

§ 302. In General.

See the *Administrative Procedure Act*, Sec. 7(c).

p. 307, n. 89. *Federal Trade Commission v. A. E. Staley Mfg. Co.* (1945) 324 U. S. 746, 89 L. Ed. 1338, 65 S. Ct. 971; *Corn Products Refining Co. v. Federal Trade Commission* (1945) 324 U. S. 726, 89 L. Ed. 1320, 65 S. Ct. 961.

p. 307, n. 90. See *Federal Trade Commission v. A. E. Staley Mfg. Co.* (1945) 324 U. S. 746, 89 L. Ed. 1338, 65 S. Ct. 971 and *Corn Products Refining Co. v. Federal Trade Commission* (1945) 324 U. S. 726, 89 L. Ed. 1320, 65 S. Ct. 961.

4. The Privilege of Introducing Evidence

§ 303. In General.

It is arbitrary and unreasonable for a trial examiner to refuse to extend a hearing for the production of testimony going to the heart of a case. *National Labor Relations Board v. Fairchild Engine & Airplane Corp.* (C. C. A. 4th, 1944) 145 F. (2d) 214.

A claim that the agency failed to reopen the case to hear evidence on the bias of certain witnesses will not be considered in the Supreme Court where no valid reason appears for failure to bring out the alleged bias at the hearing in the lower court. *Interstate Commerce Commission v. Parker* (1945) 326 U. S. 60, 89 L. Ed. 2051, 65 S. Ct. 1490.

Where, in an earlier proceeding which involved the same parties and subject matter, so that the earlier and later proceedings could be regarded substantially as one, evidence to prove a particular point had been received, it was not error for the agency to reject, in the later proceeding, evidence offered to prove the same point. *Pittsburg Plate Glass Co. v. National Labor Relations Board* (1941) 313 U. S. 146, 85 L. Ed. 1251, 61 S. Ct. 908, rehearing den. 313 U. S. 599, 85 L. Ed. 1551, 61 S. Ct. 1093.

A party may not complain of exclusion of his evidence or failure to grant him a subpoena, where the agency accepts as true *arguendo* all that he offered to prove. *National Labor Relations Board v. Dahlstrom Metallic Door Co.* (C. C. A. 2d, 1940) 112 F. (2d) 756.

The right to a full hearing before any tribunal does not include the right to challenge or rely on evidence not offered or considered. *Federal Power Commission v. Natural Gas Pipeline Co.* (1942) 315 U. S. 575, 86 L. Ed. 1037, 62 S. Ct. 736.

The trial examiner's denial of a continuance requested to enable respondent to produce witnesses was not a denial of due process in the absence of any reason for the failure of the witnesses to appear. *National Labor Relations Board v. Algoma Plywood & Veneer Co.* (C. C. A. 7th, 1941) 121 F. (2d) 602.

p. 309, n. 2. **Administrative Procedure Act.** Under the Administrative Procedure Act, Sec. 7(c), "Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts."

Bankruptcy Conciliation Commissioners. *Carter v. Kubler* (1943) 320 U. S. 243, 88 L. Ed. 26, 64 S. Ct. 1.

Federal Power Commission. *California Oregon Power Co. v. Federal Power Commission* (C. C. A. 9th, 1945) 150 F. (2d) 25.

Interstate Commerce Commission. *Inland Motor Freight v. United States* (D. C. D. Idaho, 1941) 36 F. Supp. 885. See *Elliott Bros. Trucking Co. v. United States* (D. C. D. Md., 1945) 59 F. Supp. 328.

National Labor Relations Board. * *National Labor Relations Board v. Indiana & Michigan Electric Co.* (1943) 318 U. S. 9, 87 L. Ed. 579, 63 S. Ct. 394; *Donnelly Garment Co. v. National Labor Relations Board* (C. C. A. 8th,

1941) 123 F. (2d) 215. See *Republic Aviation Corp. v. National Labor Relations Board* (1945) 324 U. S. 793, 89 L. Ed. 1372, 65 S. Ct. 982.

Price Administrator. *Mortgage Underwriting & Realty Co. v. Bowles* (Em. App., 1945) 150 F. (2d) 411.

Tax Court. See *Hord v. Commissioner of Internal Revenue* (C. C. A. 6th, 1944) 143 F. (2d) 73.

p. 310, n. 4. Due process requires that parties have opportunity to subject evidence to the test of rebuttal. *Market St. Ry. Co. v. Railroad Commission of State of California* (1945) 324 U. S. 548, 89 L. Ed. 1171, 65 S. Ct. 770.

Administrative Procedure Act. See note 2 and the Administrative Procedure Act, Sec. 7(c).

p. 311, n. 9. *National Labor Relations Board v. Fairchild Engine & Airplane Corp.* (C. C. A. 4th, 1944) 145 F. (2d) 214; *E. B. Muller & Co. v. Federal Trade Commission* (C. C. A. 6th, 1944) 142 F. (2d) 511.

§ 303A. (New) Scope of Agency's Discretion with Respect to the Admissibility of Evidence.

An administrative agency has the same discretion as that of a trial judge in a judicial proceeding, with respect to the admissibility of evidence. *American Trucking Ass'ns, Inc. v. United States* (1945) 326 U. S. 77, 89 L. Ed. 2065, 65 S. Ct. 1499; *National Labor Relations Board v. T. W. Phillips Gas & Oil Co.* (C. C. A. 3rd, 1944) 141 F. (2d) 304. See § 150A.

While a party has the privilege of introducing all competent, relevant and material evidence, the agency may exclude evidence which is merely cumulative. *American Trucking Ass'ns, Inc. v. United States* (1945) 326 U. S. 77, 89 L. Ed. 2065, 65 S. Ct. 1499.

§ 304. Right of Cross-Examination: Confrontation.

The right of cross-examination is denied when a party to an administrative proceeding is not permitted to test the truth of statements appearing in documents signed by third parties, relied on by the agency. *Kline v. United States* (D. C. D. Neb., Omaha Div., 1941) 41 F. Supp. 577.

It has been held that a person's remedy under the Declaratory Judgment Act provides him with a full hearing, and meets the requirements of due process, although no right of cross-examination was afforded in the administrative proceedings. *Gordon v. Bowles* (Em. App., 1946) 153 F. (2d) 614.

p. 311, n. 11. **Administrative Procedure Act.** See § 303, note 2, and the Administrative Procedure Act, Sec. 7(c).

Bankruptcy Conciliation Commissioners. *Carter v. Kubler* (1943) 320 U. S. 243, 88 L. Ed. 26, 64 S. Ct. 1.

Federal Power Commission. See *Federal Power Commission v. National Gas Pipeline Co.* (1942) 315 U. S. 575, 86 L. Ed. 1037, 62 S. Ct. 736.

Federal Trade Commission. *S. Buchsbaum & Co. v. Federal Trade Commission* (C. C. A. 7th, 1946) 153 F. (2d) 85, cert. granted 328 U. S. 818, 90 L. Ed. 1600, 66 S. Ct. 1016; *Associated Laboratories v. Federal Trade Commission* (C. C. A. 2d, 1945) 150 F. (2d) 629. See *Lane v. Federal Trade Commission* (C. C. A. 9th, 1942) 130 F. (2d) 48.

Denial of formal cross-examination is not prejudicial where complainants were later allowed to recall and examine the adverse witnesses. *Associated Laboratories v. Federal Trade Commission* (C. C. A. 2d, 1945) 150 F. (2d) 629.

Interstate Commerce Commission. *Kline v. United States* (D. C. D. Neb., Omaha Div., 1941) 41 F. Supp. 577.

National Labor Relations Board. Republic Aviation Corp. v. National Labor Relations Board (1945) 324 U. S. 793, 89 L. Ed. 1372, 65 S. Ct. 982; National Labor Relations Board v. Indiana & Michigan Electric Co. (1943) 318 U. S. 9, 87 L. Ed. 579, 63 S. Ct. 394; National Labor Relations Board v. Ed. Friedrich, Inc. (C. C. A. 5th, 1940) 116 F. (2d) 888.

Price Administrator. Automobile Sales Co., Inc. v. Bowles (D. C. N. D. Ohio, E. D., 1945) 58 F. Supp. 469.

Secretary of the Interior. Powhatan Mining Co. v. Ickes (C. C. A. 6th, 1941) 118 F. (2d) 105.

Selective Service Boards. United States v. Cain (C. C. A. 2d, 1945) 149 F. (2d) 338; United States v. Mallon (D. C. D. Md., 1945) 61 F. Supp. 671.

State Agencies. Market St. Ry. Co. v. Railroad Commission of State of California (1945) 324 U. S. 548, 89 L. Ed. 1171, 65 S. Ct. 770.

p. 312, n. 20. See Gordon v. Bowles (Em. App., 1946) 153 F. (2d) 614.

p. 312, n. 21. But see S. Buchsbaum & Co. v. Federal Trade Commission (C. C. A. 7th, 1946) 153 F. (2d) 85, cert. granted 328 U. S. 818, 90 L. Ed. 1600, 66 S. Ct. 1016.

§ 305. Rejection or Reception of Incompetent Evidence Not a Denial of Due Process.

Admission of irrelevant evidence in an administrative proceeding does not invalidate the proceeding where there is an administrative appeal to a higher agency, whose order supersedes that of the lower body. Cramer v. France (C. C. A. 9th, 1945) 148 F. (2d) 801. See § 45.

p. 312, n. 22. Associated Laboratories v. Federal Trade Commission (C. C. A. 2d, 1945) 150 F. (2d) 629; Commonwealth & Southern Corp. v. Securities & Exchange Corp. (C. C. A. 3rd, 1943) 134 F. (2d) 747. See also §§ 279 and 579.

p. 313, n. 24. Berkshire Knitting Mills v. National Labor Relations Board (C. C. A. 3rd, 1943) 139 F. (2d) 134, cert. den. 322 U. S. 747, 88 L. Ed. 1579, 64 S. Ct. 1158; Stewart v. United States Civil Service Commission (D. C. Ga., 1942) 45 F. Supp. 697.

p. 313, n. 25. Berkshire Knitting Mills v. National Labor Relations Board (C. C. A. 3rd, 1943) 139 F. (2d) 134, cert. den. 322 U. S. 747, 88 L. Ed. 1579, 64 S. Ct. 1158.

p. 313, n. 26. Levers v. Berkshire (C. C. A. 10th, 1945) 151 F. (2d) 935.

p. 313, n. 27. Berkshire Knitting Mills v. National Labor Relations Board (C. C. A. 3rd, 1943) 139 F. (2d) 134, cert. den. 322 U. S. 747, 88 L. Ed. 1579, 64 S. Ct. 1158.

p. 313, n. 30. See Powhatan Mining Co. v. Ickes (C. C. A. 6th, 1941) 118 F. (2d) 105.

§ 306. Right to Compulsory Process: Subpoenas.

p. 313, n. 32. National Labor Relations Board v. Ed. Friedrich, Inc. (C. C. A. 5th, 1940) 116 F. (2d) 888. See § 59.

5. The One Who Hears Must Be Unbiased

§ 309. In General.

Obtaining of a stipulation by representations that it is only needed to complete the record and then using it to institute proceedings against another party is evidence of bias on the part of a trial examiner. National Labor Relations Board v. Phelps (C. C. A. 5th, 1943) 136 F. (2d) 562.

Evidence that a member of an agency tried to assist in a boycott of a litigant's goods is admissible as tending to show bias on the part of the member. *Berkshire Employees Ass'n of Berkshire Knitting Mills v. National Labor Relations Board* (C. C. A. 3rd, 1941) 121 F. (2d) 235.

The fact that an administrative agency adopts the findings of a biased trial examiner is an important indication that a fair hearing was not given. *National Labor Relations Board v. Phelps* (C. C. A. 5th, 1943) 136 F. (2d) 562.

The fact that an administrative order is supported by substantial evidence does not justify upholding it when the hearing was vitiated by the bias of the trial examiner. *National Labor Relations Board v. Phelps* (C. C. A. 5th, 1943) 136 F. (2d) 562.

In the early stages of an administrative proceeding members of an agency are entitled to a presumption of impartiality. See § 755.

The bias of a trial examiner shown in his report is immaterial where the agency ignores the report and relies solely on the evidence in the record in making its decision. *National Labor Relations Board v. Air Associates* (C. C. A. 2d, 1941) 121 F. (2d) 586.

Strenuous objections to the examiner's conduct need not be made at the hearing where such objections would have been of no avail or where counsel may reasonably have thought that such objection would antagonize the examiner to their clients' detriment. *National Labor Relations Board v. Washington Dehydrated Food Co.* (C. C. A. 9th, 1941) 118 F. (2d) 980.

It is not prejudicial for a trial examiner to testify in a hearing before an agency, if he is confined to a few remarks as to his interpretation of a regulation. *O'Carrol v. Civil Aeronautics Board* (App. D. C., 1944) 144 F. (2d) 993.

There is no prejudice where full reargument and reconsideration of a case are granted after the removal of an allegedly biased member of an administrative agency. *Berkshire Knitting Mills v. National Labor Relations Board* (C. C. A. 3rd, 1943) 139 F. (2d) 134, cert. den. 322 U. S. 747, 88 L. Ed. 1579, 64 S. Ct. 1158.

A statement by a trial examiner that he was an "agent of the board" does not show that he was incapable of providing a fair hearing. *National Labor Relations Board v. Botany Worsted Mills* (C. C. A. 3rd, 1943) 133 F. (2d) 876, cert. den. 319 U. S. 751, 87 L. Ed. 1705, 63 S. Ct. 1164.

The fact that a trial examiner acted as trial attorney for the agency in a preliminary investigation of the same case does not necessarily establish bias. *National Labor Relations Board v. Botany Worsted Mills* (C. C. A. 3rd, 1943) 133 F. (2d) 876, cert. den. 319 U. S. 751, 87 L. Ed. 1705, 63 S. Ct. 1164.

Disagreement by the trial examiner and the agency with contentions of a party to proceedings does not establish bias. *National Labor Relations Board v. Gallup American Coal Co.* (C. C. A. 10th, 1942) 131 F. (2d) 665.

Where the litigant's attorney thanked the trial examiner for his conduct and impartiality, the litigant could not later contend that the

examiner had been biased. *National Labor Relations Board v. Luxuray, Inc.* (C. C. A. 2d, 1941) 123 F. (2d) 106.

Erroneous rulings on issues to be tried or exclusion of evidence, or drawing of unwarranted inferences do not justify a conclusion of prejudice or deliberate unfairness. *Donnelly Garment Co. v. National Labor Relations Board* (C. C. A. 8th, 1941) 123 F. (2d) 215.

There is no denial of due process in permitting the members of an advisory committee to appear at a hearing by counsel to offer evidence in support of its recommendation, on which an order is to be based, or in permitting members of the agency's staff to testify. *Opp Cotton Mills, Inc. v. Administrator of the Wage & Hour Division* (1941) 312 U. S. 126, 85 L. Ed. 624, 61 S. Ct. 524; *Southern Garment Manufacturers Ass'n v. Fleming* (App. D. C., 1941) 122 F. (2d) 622.

It has been held that the right to challenge the qualification of a member of an administrative agency is a matter for Congress to decide, and that, in the absence of statutory provisions, no such right will be conferred by the courts. *Marquette Cement Mfg. Co. v. Federal Trade Commission* (C. C. A. 7th, 1945) 147 F. (2d) 589. But see notes 44 and 45.

It has been held that bias may not disqualify an agency itself from acting in a proceeding, as then the case would remain untried. *Marquette Cement Mfg. Co. v. Federal Trade Commission* (C. C. A. 7th, 1945) 147 F. (2d) 589; *Loughran v. Federal Trade Commission* (C. C. A. 8th, 1944) 143 F. (2d) 431.

But in order to warrant setting aside an order based on proceedings held before an allegedly prejudiced examiner prejudice must be clearly shown. *National Labor Relations Board v. Ford Motor Co.* (C. C. A. 6th, 1940) 114 F. (2d) 905, cert. den. 312 U. S. 689, 85 L. Ed. 1126, 61 S. Ct. 621.

Needless interruptions and interferences by the trial examiner impeding production of the petitioners' evidence are not grounds for reversal, however, where the petitioners were not finally prevented from a full and complete presentation of their case. *Irwin v. Federal Trade Commission* (C. C. A. 8th, 1944) 143 F. (2d) 316.

Administrative Procedure Act. "(c) SEPARATION OF FUNCTIONS.—The same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended decision or initial decision required by section 8 except where such officers become unavailable to the agency. Save to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings. This subsection shall not apply in determining applications for initial licenses or to proceedings involving the validity or

application of rates, facilities, or practices of public utilities or carriers; nor shall it be applicable in any manner to the agency or any member or members of the body comprising the agency." (Administrative Procedure Act, Sec. 5(c).) See the Administrative Procedure Act, Sec. 7(a), and § 174 herein.

p. 315, n. 46. **National Labor Relations Board.** *National Labor Relations Board v. Phelps (C. C. A. 5th, 1943) 136 F. (2d) 562; National Labor Relations Board v. Weirton Steel Co. (C. C. A. 3rd, 1943) 135 F. (2d) 494; National Labor Relations Board v. Acme-Evans Co. (C. C. A. 7th, 1942) 130 F. (2d) 477, cert. den. 318 U. S. 772, 87 L. Ed. 1142, 63 S. Ct. 769. See National Labor Relations Board v. Baldwin Locomotive Works (C. C. A. 3rd, 1942) 128 F. (2d) 39; National Labor Relations Board v. Western Cartridge Co. (C. C. A. 2d, 1943) 138 F. (2d) 551, cert. den. 321 U. S. 786, 88 L. Ed. 1077, 64 S. Ct. 780; Oregon Shipbuilding Corp. v. National Labor Relations Board (D. C. D. Ore., 1943) 47 F. Supp. 386. See also Stephens, J., dissenting in Bethlehem Steel Co. v. National Labor Relations Board (1941) 74 App. D. C. 52, 120 F. (2d) 641.

Secretary of Agriculture. "Cabinet officers charged by Congress with adjudicatory functions are not assumed to be flabby creatures any more than judges are. Both may have an underlying philosophy in approaching a specific case. But both are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances." (Mr. Justice Frankfurter in *United States v. Morgan* (1941) 313 U. S. 409, 421, 85 L. Ed. 1429, 61 S. Ct. 999.)

Law Review Articles. See E. R. Fischer, "Should Prejudgment Before Hearing in a Quasi-Judicial Proceeding Disqualify an Administrative Agency?" (1945) 33 Georgetown L. J. 311; R. D. Scott, "Bias of Trial Examiner and Due Process of Law" (1941) 30 Georgetown L. J. 54; and note, "Power of Commission to Disqualify Commissioner for Prejudice" (1938) 51 Harv. L. Rev. 1101.

p. 316, n. 47. **National Labor Relations Board v. Phelps** (C. C. A. 5th, 1943) 136 F. (2d) 562.

p. 316, n. 48. **National Labor Relations Board v. Western Cartridge Co.** (C. C. A. 2d, 1943) 138 F. (2d) 551, cert. den. 321 U. S. 786, 88 L. Ed. 1077, 64 S. Ct. 780.

p. 316, n. 49. **National Labor Relations Board v. Phelps** (C. C. A. 5th, 1943) 136 F. (2d) 562; *National Labor Relations Board v. Washington Dehydrated Food Co. (C. C. A. 9th, 1941) 118 F. (2d) 980.

p. 316, n. 50. See **National Labor Relations Board v. Western Cartridge Co.** (C. C. A. 2d, 1943) 138 F. (2d) 551, cert. den. 321 U. S. 786, 88 L. Ed. 1077, 64 S. Ct. 780; **National Labor Relations Board v. Washington Dehydrated Food Co.** (C. C. A. 9th, 1941) 118 F. (2d) 980.

p. 316, n. 51. **National Labor Relations Board.** **National Labor Relations Board v. Baldwin Locomotive Works** (C. C. A. 3rd, 1942) 128 F. (2d) 39; **Donnelly Garment Co. v. National Labor Relations Board** (C. C. A. 8th, 1941) 123 F. (2d) 215. See **National Labor Relations Board v. Cleveland-Cliffs Iron Co.** (C. C. A. 6th, 1943) 133 F. (2d) 295; **National Labor Relations Board v. Acme-Evans Co.** (C. C. A. 7th, 1942) 130 F. (2d) 477, cert. den. 318 U. S. 772, 87 L. Ed. 1142, 63 S. Ct. 769; and **National Labor Relations Board v. Air Associates** (C. C. A. 2d, 1941) 121 F. (2d) 586.

p. 316, n. 52. **Administrator of Wage and Hour Division.** The role which an examiner fills is significant. The very essence of a fair hearing may depend on his conduct. See Mr. Justice Douglas dissenting in **Cudahy Packing Co. of Louisiana v. Holland** (1942) 315 U. S. 357, 788, 86 L. Ed. 895, 62 S. Ct. 651.

Alien Cases. See **Quan Toon Jung v. Bonham** (C. C. A. 9th, 1941) 119 F. (2d) 915.

National Labor Relations Board. **National Labor Relations Board v. Western Cartridge Co.** (C. C. A. 2d, 1943) 138 F. (2d) 551, cert. den. 321 U. S. 786, 88

L. Ed. 1077, 64 S. Ct. 780; *National Labor Relations Board v. Acme-Evans Co.* (C. C. A. 7th, 1942) 130 F. (2d) 477, cert. den. 318 U. S. 772, 87 L. Ed. 1142, 63 S. Ct. 769.

It is the function of an examiner, just as it is the recognized function of a trial judge, to see that facts are clearly and fully developed. He is not required to sit idly by and permit a confused or meaningless record to be made without asking the witness questions. *National Labor Relations Board v. Franks Bros. Co.* (C. C. A. 1st, 1943), 137 F. (2d) 989, aff'd 321 U. S. 702, 88 L. Ed. 1020, 64 S. Ct. 817.

p. 316, n. 53. See *National Labor Relations Board v. May Department Stores* (C. C. A. 8th, 1946) 154 F. (2d) 533.

p. 317, n. 56. *Marquette Cement Mfg. Co. v. Federal Trade Commission* (C. C. A. 7th, 1945) 147 F. (2d) 589.

p. 317, n. 58. *Perkins v. Brown* (D. C. S. D. Ga., Savannah Div., 1943) 53 F. Supp. 176; *Brinkley v. Hassig* (C. C. A. 2nd, 1936) 83 F. (2d) 351.

6. The One Who Decides Must Hear

§ 310. In General.

p. 318, n. 61. In deportation proceedings testimony is taken before an inspector, the case is then heard by the Board of Immigration Appeals, and may be reviewed by the Attorney General. If the Attorney General reviews the case, he necessarily becomes an original trier of fact on the whole record, and it is his decision to deport the alien that Congress has made "final." *Bridges v. Wixon* (1945) 326 U. S. 135, 89 L. Ed. 2103, 65 S. Ct. 1443.

Administrative Procedure Act. Under the Administrative Procedure Act, Sec. 7(c), "... no sanction shall be imposed or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence."

Section 7(d) of the Act provides as follows: "(d) RECORD.—The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision in accordance with section 8 and, upon payment of lawfully described costs, shall be made available to the parties. Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary."

§ 311. Assistance from Subordinates.

Evidence has been taken before an examiner or hearing commissioner and approved by the administrative agency without providing an opportunity to the petitioner to except to the examiner's adverse findings of fact or to present oral argument to him. See *Levers v. Anderson* (1945) 326 U. S. 219, 90 L. Ed. 26, 66 S. Ct. 72.

p. 318, n. 64. **Administrator of Wage and Hour Division.** See *Southern Garment Manufacturers Ass'n v. Fleming* (App. D. C., 1941) 122 F. (2d) 622.

Federal Trade Commission. *California Lumbermen's Council v. Federal Trade Commission* (C. C. A. 9th, 1940) 115 F. (2d) 178, cert. den. 312 U. S. 709, 85 L. Ed. 1141, 61 S. Ct. 827.

National Labor Relations Board. *National Labor Relations Board v. Jasper Chair Co.* (C. C. A. 7th, 1943) 138 F. (2d) 756, cert. den. 321 U. S. 777, 88 L. Ed. 1070, 64 S. Ct. 618; *National Labor Relations Board v. Baldwin Locomotive Works* (C. C. A. 3rd, 1942) 128 F. (2d) 39.

Price Administrator. *La Porte v. Bitker* (C. C. A. 7th, 1944) 145 F. (2d) 445.

Selective Service Boards. *United States ex rel. Brandon v. Donner* (C. C. A. 2d, 1944) 139 F. (2d) 761.

Workmen's Compensation Cases. *Lacomastic Corp. v. Parker* (D. C. D. Md., 1944) 54 F. Supp. 138.

p. 319, n. 65. *United States ex rel. Brandon v. Donner* (C. C. A. 2d, 1944) 139 F. (2d) 761; *National Labor Relations Board v. Baldwin Locomotive Works* (C. C. A. 3rd, 1942) 128 F. (2d) 39; *Lacomastic Corp. v. Parker* (D. C. D. Md., 1944) 54 F. Supp. 138.

p. 319, n. 66. *Lacomastic Corp. v. Parker* (D. C. D. Md., 1944) 54 F. Supp. 138.

p. 319, n. 68. *National Labor Relations Board v. Baldwin Locomotive Works* (C. C. A. 3rd, 1942) 128 F. (2d) 39; *California Lumbermen's Council v. Federal Trade Commission* (C. C. A. 9th, 1940) 115 F. (2d) 178, cert. den. 312 U. S. 709, 85 L. Ed. 1141, 61 S. Ct. 827. See *Levers v. Anderson* (1945) 326 U. S. 219, 90 L. Ed. 26, 66 S. Ct. 72.

p. 319, n. 69. *La Porte v. Bitker* (C. C. A. 7th, 1944) 145 F. (2d) 445. See *National Labor Relations Board v. Jasper Chair Co.* (C. C. A. 7th, 1943) 138 F. (2d) 756, cert. den. 321 U. S. 777, 88 L. Ed. 1070, 64 S. Ct. 618; *Lacomastic Corp. v. Parker* (D. C. D. Md., 1944) 54 F. Supp. 138.

p. 320, n. 73. *Ex Parte Lee Bock Fook* (D. C. S. D. Cal., 1941) 40 F. Supp. 937. See *S. Buchsbaum & Co. v. Federal Trade Commission* (C. C. A. 7th, 1946) 153 F. (2d) 85, cert. granted 328 U. S. 818, 90 L. Ed. 1600, 66 S. Ct. 1016.

§ 312. Familiarity with the Evidence and Argument.

It has been held that where a trial examiner dies before the hearings on a case are completed, his successor must hear the entire evidence de novo in order to fulfil the requirements of due process. *S. Buchsbaum & Co. v. Federal Trade Commission* (C. C. A. 7th, 1946) 153 F. (2d) 85, cert. granted 328 U. S. 818, 90 L. Ed. 1600, 66 S. Ct. 1016.

p. 321, n. 79. *Twin City Milk Producers Ass'n v. McNutt* (C. C. A. 8th, 1941) 122 F. (2d) 564.

7. Duty of Deciding in Accordance with Evidence

§ 314. In General.

The rule that administrative agencies must decide in accordance with the evidence adduced, is a rule of substance not of form. The mere fact that the agency has looked beyond the record proper does not invalidate its action unless prejudice is shown to result. *United States v. Pierce Auto Lines Inc.* (1946) 327 U. S. 515, 90 L. Ed. 821, 66 S. Ct. 687.

An incidental reference in an administrative decision to published reports of a party, which reports were not introduced in evidence before the agency, does not amount to a denial of the substantial requirements of due process in the absence of a showing of prejudice to the party. *Market St. Ry. Co. v. Railroad Commission of State of California* (1945) 324 U. S. 548, 89 L. Ed. 1171, 65 S. Ct. 770.

p. 322, n. 85. *Alien Cases*. See *Quan Toon Jung v. Bonham* (C. C. A. 9th, 1941) 119 F. (2d) 915.

Bankruptcy Conciliation Commissioners. *Carter v. Kubler* (1943) 320 U. S. 243, 88 L. Ed. 26, 64 S. Ct. 1.

Interstate Commerce Commission. *United States v. Pierce Auto Lines Inc.* (1946) 327 U. S. 515, 90 L. Ed. 821, 66 S. Ct. 687; *Erie R. Co. v. United States* (D. C. S. D. Ohio, 1945) 64 F. Supp. 162; *Watson Bros. Transportation Co. Inc. v. United States* (D. C. D. Neb., Omaha Div., 1945) 59 F. Supp. 762. *Erie R. Co. v. United States* (D. C. S. D. Ohio E. D., 1944) 59 F. Supp. 748; *Kline v. United States* (D. C. D. Neb., Omaha Div., 1941) 41 F. Supp. 577; *Inland Motor Freight v. United States* (D. C. D. Idaho, 1941) 36 F. Supp. 885; *City*

of *Harrisonburg v. Chesapeake & O. R. Co.* (D. C. W. D. Va., 1940) 34 F. Supp. 640; See *Interstate Commerce Commission v. Jersey City* (1944) 322 U. S. 503, 88 L. Ed. 1420, 64 S. Ct. 1129.

National Labor Relations Board. *Republic Aviation Corp. v. National Labor Relations Board* (1945) 324 U. S. 793, 89 L. Ed. 1372, 65 S. Ct. 982.

Securities and Exchange Commission. See *Wright v. Securities & Exchange Commission* (C. C. A. 2d, 1943) 134 F. (2d) 733.

Selective Service Boards. An agency's decision is improper when it is based wholly on the recommendation of an "Advisory Panel." Such procedure is an abdication of the agency's statutory duties. *United States v. Cain* (C. C. A. 2d, 1945) 149 F. (2d) 338. See *United States v. Mallon* (D. C. D. Md., 1945) 61 F. Supp. 671.

A selective service local board may not rely upon the report of a local welfare society obtained and introduced into the board's file without notice to the registrant. *United States v. Bowen* (D. C. Del. 1942) 45 F. Supp. 301; *DeGraw v. Toon* (C. C. A. 2d, 1945) 151 F. (2d) 778. But see *U. S. v. Nichols* (C. C. A. 3rd, 1945) 151 F. (2d) 155 and *Lehr v. United States* (C. C. A. 5th, 1943) 139 F. (2d) 919.

State Agencies. *Market St. Ry. Co. v. Railroad Commission of State of California* (1945) 324 U. S. 548, 89 L. Ed. 1171, 65 S. Ct. 770.

War Food Administrator. *Grandview Dairy Inc. v. Jones* (D. C. E. D. N. Y., 1945) 61 F. Supp. 460.

Workmen's Compensation Cases. *Wood Preserving Corp. v. McManigal* (D. C. W. D. Ky., 1941) 39 F. Supp. 177.

p. 324, n. 89. *Erie R. Co. v. United States* (D. C. S. D. Ohio, 1945) 64 F. Supp. 162. But see *Harris v. Ross* (C. C. A. 5th, 1944) 146 F. (2d) 355 and *Lehr v. United States* (C. C. A. 5th, 1943) 139 F. (2d) 919.

p. 324, n. 90. See J. Forrester Davison, "Use of Public Documents and Reports in Administrative Proceedings" (1940) 25 Iowa L. Rev. 555.

p. 325, n. 95. *Fireman's Fund Ins. Co. v. Peterson* (C. C. A. 9th, 1941) 120 F. (2d) 547.

p. 325, n. 96. *Ex Parte Lee Bock Fook* (D. C. S. D. Cal., 1941) 40 F. Supp. 937. See *Interstate Commerce Commission v. Jersey City* (1944) 322 U. S. 503, 88 L. Ed. 1420, 64 S. Ct. 1129.

p. 325, n. 1. An agency must not ignore proper evidence presented. *Pate Stevedoring Co. v. Henderson* (D. C. Ala., 1942) 44 F. Supp. 12. But see *Beaudry v. Commissioner of Internal Revenue* (C. C. A. 2d, 1945) 150 F. (2d) 20. See also §§ 171A, 173A, 590B and 590C.

§ 315. — Evidence and Argument Must Be Considered.

The contentions of an administrative agency intervening in a proceeding before another agency are entitled to neither more nor less weight than that accorded a private litigant. See § 148A.

p. 326, n. 5. **Interstate Commerce Commission.** See *Interstate Commerce Commission v. Jersey City* (1944) 322 U. S. 503, 88 L. Ed. 1420, 64 S. Ct. 1129.

National Labor Relations Board. See *National Labor Relations Board v. Ford Motor Co.* (C. C. A. 9th, 1941) 118 F. (2d) 766.

Postmaster General. See *Pike v. Walker* (App. D. C., 1941) 121 F. (2d) 37, cert. den. 314 U. S. 625, 86 L. Ed. 502, 62 S. Ct. 94.

Secretary of Agriculture. *A. E. Staley Mfg. Co. v. Secretary of Agriculture* (C. C. A. 7th, 1941) 120 F. (2d) 258.

p. 326, n. 7. See §§ 171A, 173A, 590B and 590C.

p. 327, n. 10. See *National Labor Relations Board v. Ford Motor Co.* (C. C. A. 9th, 1941) 118 F. (2d) 766; *Watson Bros. Transportation Co., Inc. v. United States* (D. C. D. Neb., Omaha Div., 1945) 59 F. Supp. 762. See also § 755.

p. 327, n. 12. Administrative agencies are not compelled to annotate to each finding the evidence supporting it. *United States v. Pierce Auto Lines Inc.* (1946) 327 U. S. 515, 90 L. Ed. 821, 66 S. Ct. 687.

p. 327, n. 13. *A. E. Staley Mfg. Co. v. Secretary of Agriculture* (C. C. A. 7th, 1941) 120 F. (2d) 258.

§ 316. Evidence Relied on Must Be Recorded.

It has been held that a local Selective Service Board may base its classification of a person before it on its own knowledge and that no record of the basis for its decision is required. *United States v. Nichols* (C. C. A. 3rd, 1945) 151 F. (2d) 155.

p. 328, n. 17. See *Securities & Exchange Commission v. Chenery Corp.* (1943) 318 U. S. 80, 87 L. Ed. 626, 63 S. Ct. 454.

p. 329, n. 18. But see *Harris v. Ross* (C. C. A. 5th, 1944) 146 F. (2d) 355 and *Beaudry v. Commissioner of Internal Revenue* (C. C. A. 2d, 1945) 150 F. (2d) 20. See § 314.

§ 317. Conduct of Hearing by Employee Does Not Exempt Agency from Deciding on Evidence.

Where the trial examiner overlooked a pertinent fact it was no denial of a fair hearing for the agency to reach an opposite conclusion to that of the trial examiner. *Wilson & Co. v. National Labor Relations Board* (C. C. A. 7th, 1941) 124 F. (2d) 845.

p. 330, n. 26. *Bridges v. Wixon* (1945) 326 U. S. 135, 89 L. Ed. 2103, 65 S. Ct. 1443. See *Pike v. Walker* (App. D. C. 1941) 121 F. (2d) 37, cert. den. 314 U. S. 625, 86 L. Ed. 502, 62 S. Ct. 94.

8. Right to Rehearing

§ 318. In General.

Where new or additional evidence has no direct bearing on the administrative questions determined, or where even if true it would not render erroneous the previous administrative determination, failure to grant a rehearing is not a denial of due process. *New Idea, Inc. v. National Labor Relations Board* (C. C. A. 7th, 1941) 117 F. (2d) 517.

The reviewing court will not presume that a fair hearing has been denied a claimant who fails to include in evidence its petition to the agency for reconsideration and the reasons and purposes therefor. *Chicago, St. P., M. & O. Ry. Co. v. United States* (1944) 322 U. S. 1, 88 L. Ed. 1093, 64 S. Ct. 842. See also § 755.

p. 330, n. 28. *Chiquita Mining Co. v. Commissioner of Internal Revenue* (C. C. A. 9th, 1945) 148 F. (2d) 306. See *Interstate Commerce Commission v. Jersey City* (1944) 322 U. S. 503, 88 L. Ed. 1420, 64 S. Ct. 1129 and *Okin v. Securities & Exchange Commission* (C. C. A. 2d, 1943) 137 F. (2d) 398.

p. 330, n. 29. * *Interstate Commerce Commission v. Jersey City* (1944) 322 U. S. 503, 88 L. Ed. 1420, 64 S. Ct. 1129.

p. 332, n. 39. See *United States v. Wabash R. Co.* (1944) 322 U. S. 198, 88 L. Ed. 1225, 64 S. Ct. 974.

§ 319. Diligence Necessary.

p. 332, n. 40. See *United States v. Wabash R. Co.* (1944) 322 U. S. 198, 88 L. Ed. 1225, 64 S. Ct. 974.

II. PROCEDURAL DUE PROCESS IN JUDICIAL REVIEW

§ 321. Agency's Findings May Be Prima Facie Evidence in Judicial Proceedings.

p. 333, n. 46. See *Washington Terminal Co. v. Boswell* (App. D. C., 1941) 124 F. (2d) 235, aff'd 319 U. S. 732, 87 L. Ed. 1694, 63 S. Ct. 1430.

CHAPTER 22

DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS OF
LAW: CONFISCATIONI. NATURE OF CONFISCATION: DEFINITIONS: CONDITIONS UNDER
WHICH IT MAY EXIST**§ 323. Definitions: When Confiscation Exists.**

Price control, like other forms of regulation, may reduce the value of the property regulated, but that does not mean that the regulation is unconstitutional. *Bowles v. Willingham* (1944) 321 U. S. 503, 88 L. Ed. 892, 64 S. Ct. 641. The fixing of rates, like other applications of the police power, may reduce the value of the property which is being regulated. But the fact that the value is reduced does not mean that the regulation is confiscatory. *Federal Power Commission v. Hope Natural Gas Co.* (1944) 320 U. S. 591, 88 L. Ed. 333, 64 S. Ct. 281.

One member of a class which is regulated may suffer economic losses not shared by others of the class, but this has never been a barrier to the exercise of police power. *Bowles v. Willingham* (1944) 321 U. S. 503, 88 L. Ed. 892, 64 S. Ct. 641.

It is implicit in the power to regulate rates or prices that high cost operators may be more seriously affected than others. *Bowles v. Willingham* (1944) 321 U. S. 503, 88 L. Ed. 892, 64 S. Ct. 641.

The restraints imposed on the national government in the exercise of the police power by the Fifth Amendment are no greater than those imposed on the states by the Fourteenth Amendment. *Bowles v. Willingham* (1944) 321 U. S. 503, 88 L. Ed. 892, 64 S. Ct. 641. *United States v. Appalachian Electric Power Co.* (1940) 311 U. S. 377, 85 L. Ed. 243, 61 S. Ct. 291, rehearing den. 312 U. S. 712, 85 L. Ed. 1143, 61 S. Ct. 548.

If the agency's order, as applied to the facts before it and viewed in its entirety, produces no arbitrary result, the court's inquiry is at an end. *Federal Power Commission v. Natural Gas Pipeline Co.* (1942) 315 U. S. 575, 86 L. Ed. 1037, 62 S. Ct. 736.

p. 337, n. 3. With respect to the history of judicial review in rate cases and that of the doctrine of confiscation as a limitation to be enforced by the judiciary upon the legislative power to fix utility rates, see Mr. Justice Frankfurter concurring in *Federal Power Commission v. Natural Gas Pipeline Co.* (1942) 315 U. S. 575, 86 L. Ed. 1037, 62 S. Ct. 736.

§ 323A. (New) — What Constitutes Property.

An unlawful denial by state action of a right to state political office is not a denial of a property right secured by the due process clause. *Snowden v. Hughes* (1944) 321 U. S. 1, 88 L. Ed. 497, 64 S. Ct. 397.

§ 324. — Just Compensation.

p. 339, n. 17. See *Federal Power Commission v. Hope Natural Gas Co.* (1944) 320 U. S. 591, 88 L. Ed. 333, 64 S. Ct. 281.

p. 340, n. 19. The same criterion has been applied under the Natural Gas Act, 15 USC 717 et seq. See *Panhandle Eastern Pipe Lines Co. v. Federal Power Commission* (1945) 324 U. S. 635, 89 L. Ed. 1241, 65 S. Ct. 821; *Colorado Interstate Gas Co. v. Federal Power Commission* (1945) 324 U. S. 581, 89 L. Ed. 1206, 65 S. Ct. 829; *Federal Power Commission v. Hope Natural Gas Co.* (1944) 320 U. S. 591, 88 L. Ed. 333, 64 S. Ct. 281.

§ 325A. (New) — Confiscation through Prescription of Method of Accounting.

Confiscation can probably be effected through the prescription by an administrative agency of a method of keeping accounts. See *Northwestern Electric Co. v. Federal Power Commission* (1944) 321 U. S. 119, 88 L. Ed. 596, 64 S. Ct. 451.

However there is no confiscation where an administrative order prescribing a uniform system of accounts merely prevents a corporation from redressing a deficiency of paid-in capital by entering among its assets appreciation of value subsequent to the issue of the common stock, and takes nothing from the company or the stockholders. *Northwestern Electric Co. v. Federal Power Commission* (1944) 321 U. S. 119, 88 L. Ed. 596, 64 S. Ct. 451. See also § 600 et seq.

§ 326. No Confiscation Where No Investment.

p. 341, n. 25. *Interstate Commerce Commission v. Hoboken Manufacturers' R. Co.* (1943) 320 U. S. 368, 88 L. Ed. 107, 64 S. Ct. 159.

§ 327A. (New) Confiscation and Bad Service.

The question whether a confiscatory rate can be justified because service is bad has been expressly left open. Considerations of the value of the service may be relevant. Nonconfiscatory rates are clearly not so based upon "value of service" as to raise a constitutional issue where the administrative agency merely takes into consideration practical results to the public of past advances which it has allowed. *Market St. Ry. Co. v. Railroad Commission of State of California* (1945) 324 U. S. 548, 89 L. Ed. 1171, 65 S. Ct. 770.

§ 329. Time as of Which Confiscation Exists.

Where the cause is moot except for rights in certain funds segregated under a stay pending appeal, the confiscatory nature of the order will be determined as of the date on which the order was made. *Market St. Ry. Co. v. Railroad Commission of State of California* (1945) 324 U. S. 548, 89 L. Ed. 1171, 65 S. Ct. 770.

§ 334. Temporary Orders: Where Experimental.

Where an administrative order reducing rates contemplated a test by experience of whether the reduction would increase traffic, but the utility itself prevented such test, the unavailability of experience to test the order could not affect its validity or raise a constitutional objection to be enforced by the courts. *Market St. Ry. Co. v. Railroad Commission of State of California* (1945) 324 U. S. 548, 89 L. Ed. 1171, 65 S. Ct. 770.

p. 349, n. 81. *Market St. Ry. Co. v. Railroad Commission of State of California* (1945) 324 U. S. 548, 89 L. Ed. 1171, 65 S. Ct. 770.

II. JUDICIAL NATURE OF THE QUESTION OF CONFISCATION**§ 336. Confiscation a Prime Judicial Question.**

p. 350, n. 88. Rate making is a purely legislative matter. *Panhandle Eastern Pipe Line Co. v. Federal Power Commission* (1945) 324 U. S. 635, 89 L. Ed. 1241, 65 S. Ct. 821; *Colorado Interstate Gas Co. v. Federal Power Commission* (1945) 324 U. S. 581, 89 L. Ed. 1206, 65 S. Ct. 829; *Colorado-Wyoming Gas Co. v. Federal Power Commission* (1945) 324 U. S. 626, 89 L. Ed. 1235, 65 S. Ct. 850; *Federal Power Commission v. Hope Natural Gas Co.* (1944) 320 U. S. 591, 88 L. Ed. 333, 64 S. Ct. 281.

§ 336A. (New) — “Just and Reasonable” Rates as Equivalent to Nonconfiscatory Rates.

There are no constitutional requirements more exacting than the standards of the Natural Gas Act, 15 USC 717 et seq. A rate order which conforms to the latter does not run afoul of the former. Accordingly the measure of a “just and reasonable” rate may be determined by the cases on confiscation. *Federal Power Commission v. Hope Natural Gas Co.* (1944) 324 U. S. 591, 88 L. Ed. 333, 64 S. Ct. 281.

§ 338. Case Must Be Clear.

p. 352, n. 99. *Railroad Commission of Texas v. Rowan & Nichols Oil Co.* (1941) 311 U. S. 570, 85 L. Ed. 358, 61 S. Ct. 343.

IV. THE RATE BASE**A. Composition of the Rate Base****§ 344. Peculiar Nature of Most Utility Property.**

p. 357, n. 27. Evidence of market value of utility property in the form of the utility's offer to sell occasionally appears. *Market St. Ry. Co. v. Railroad Commission of State of California* (1945) 324 U. S. 548, 89 L. Ed. 1171, 65 S. Ct. 770.

§ 345. Composition of the Rate Base: In General.

The rate base method of fixing rates is permissible under the Natural Gas Act, 15 USC 717 et seq.; * *Colorado Interstate Gas Co. v. Federal Power Commission* (1945) 324 U. S. 581, 89 L. Ed. 1206,

65 S. Ct. 829; *Panhandle Eastern Pipe Line Co. v. Federal Power Commission* (1945) 324 U. S. 635, 89 L. Ed. 1241, 65 S. Ct. 821; *Colorado-Wyoming Gas Co. v. Federal Power Commission* (1945) 324 U. S. 626, 89 L. Ed. 1235, 65 S. Ct. 850; *Federal Power Commission v. Hope Natural Gas Co.* (1944) 320 U. S. 591, 88 L. Ed. 333, 64 S. Ct. 281.

Excess plant capacity which is a part of the utility's equipment may be included in the rate base as "used and useful" property. *Federal Power Commission v. Natural Gas Pipeline Co.* (1942) 315 U. S. 575, 86 L. Ed. 1037, 62 S. Ct. 736.

§ 346. Particular Items Included.

Leasehold-producing properties and gathering facilities of a natural gas company producing gas for sale in interstate commerce are properly included in the construction of the rate base under the Natural Gas Act, 15 USC 717 et seq. *Panhandle Eastern Pipe Line Co. v. Federal Power Commission* (1945) 324 U. S. 635, 89 L. Ed. 1241, 65 S. Ct. 821; *Colorado Interstate Gas Co. v. Federal Power Commission* (1945) 324 U. S. 581, 89 L. Ed. 1206, 65 S. Ct. 829.

p. 359, n. 42. See *Panhandle Eastern Pipe Line Co. v. Federal Power Commission* (1945) 324 U. S. 635, 89 L. Ed. 1241, 65 S. Ct. 821; *Colorado Interstate Gas Co. v. Federal Power Commission* (1945) 324 U. S. 581, 89 L. Ed. 1206, 65 S. Ct. 829; *Colorado-Wyoming Gas Co. v. Federal Power Commission* (1945) 324 U. S. 626, 89 L. Ed. 1235, 65 S. Ct. 850; *Federal Power Commission v. Hope Natural Gas Co.* (1944) 320 U. S. 591, 88 L. Ed. 333, 64 S. Ct. 281.

§ 347. Particular Items Not Included.

The capitalized value of expenditures formerly carried as operating expenses is likewise properly excluded from the rate base. Thus, in a case under the Natural Gas Act, 15 USC 717 et seq., not involving confiscation, where a natural gas company charged costs of drilling new wells to operating expenses until required by the Uniform System of Accounting prescribed for such companies to capitalize such expenditures, the Commission properly refused to add these items to the rate base, pointing out that their inclusion under such circumstances would unjustly place multiple charges on the consumers. *Federal Power Company v. Hope Natural Gas Co.* (1944) 320 U. S. 591, 88 L. Ed. 333, 64 S. Ct. 281.

p. 361, n. 56. *Federal Power Commission v. Natural Gas Pipeline Co.* (1942) 315 U. S. 575, 86 L. Ed. 1037, 62 S. Ct. 736.

§ 349A. (New) Federal Rate Cases; Property in More Than One State.

Under the Natural Gas Act, 15 USC 717 et seq., the Federal Power Commission has jurisdiction to include in the rate base the company's producing properties, gathering facilities and leaseholds, instead of eliminating such items from the rate base and allowing a field price or actual field value of gas as an expense item. *Panhandle Eastern Pipe Line Co. v. Federal Power Commission* (1945) 324 U. S. 635, 89 L. Ed. 1241, 65 S. Ct. 821.

B. Valuation of the Rate Base; and General Aspects of Valuation

1. In General

§ 350. Valuation Not Matter of Formula.

The due process clause never has been held to require an administrative agency to fix rates on the present reproduction value of something no one would presently want to reproduce, or on the historical valuation of a property whose history and current financial statements showed the value no longer to exist, or on an investment after it has vanished, even if once prudently made, or to maintain the credit of a concern whose securities are already impaired. The due process clause has been applied to prevent governmental destruction of existing economic values. It has not and cannot be applied to insure values or to restore values that have been lost by the operation of economic forces. *Market St. Ry. Co. v. Railroad Commission of State of California* (1945) 324 U. S. 548, 89 L. Ed. 1171, 65 S. Ct. 770.

p. 365, n. 79. *Federal Power Commission v. Natural Gas Pipeline Co.* (1942) 315 U. S. 575, 86 L. Ed. 1037, 62 S. Ct. 736.

See note, "Judicial Control Over Methods of Valuation in Public Utility Rate Cases" (1938) 51 Harv. L. Rev. 885.

Under the Natural Gas Act, 15 USC 717 et seq., in a case where confiscation was not an issue, it was held that the Federal Power Commission may use any formula for the fixing of rates. The only question on review is not the method of valuation which was used but the end result obtained as to whether the rate fixed is "just or reasonable." *Panhandle Eastern Pipe Line Co. v. Federal Power Commission*, 324 U. S. 635, 89 L. Ed. 1241, 65 S. Ct. 821.

p. 365, n. 83. With respect to the necessity for considering evidence of reproduction cost, see § 354.

§ 351. Valuation as a Judicial Question.

It has been held that rates cannot be made to depend on "fair value" when the value of a going enterprise depends on earnings under whatever rates may be anticipated. "Fair value" is the end product of the process of rate making, not the starting point. *Federal Power Commission v. Hope Natural Gas Co.* (1945) 324 U. S. 591, 88 L. Ed. 333, 64 S. Ct. 281.

p. 366, n. 84. With respect to the necessity for evidence of reproduction cost, see § 354.

p. 366, n. 87. Very clear evidence of market value of utility property, in the form of an offer to sell by the utility in question occasionally appears. Under the circumstances such proof was held to be far more persuasive than theoretical evidence of either historical or reproduction cost. Fair value may be only salvage or scrap value in an appropriate case. *Market St. Ry. Co. v. Railroad Commission of State of California* (1945) 324 U. S. 548, 89 L. Ed. 1171, 65 S. Ct. 770.

§ 353. Valuation as an Administrative Question.

Leaseholds included in the rate base have been administratively valued at original cost. *Colorado Interstate Gas Co. v. Federal Power Commission* (1945) 324 U. S. 581, 89 L. Ed. 1206, 65 S. Ct. 829.

p. 368, n. 97. *Ecker v. Western Pac. R. Corp.* (1943) 318 U. S. 448, 87 L. Ed. 892, 63 S. Ct. 692; *In re St. Louis Southwestern Ry.* (D. C. E. D. Mo.,

E. D., 1944) 53 F. Supp. 914. See *Federal Power Commission v. Hope Natural Gas Co.* (1944) 320 U. S. 591, 88 L. Ed. 333, 64 S. Ct. 281, and § 549.

2. Factors Considered in Valuation of the Rate Base

a. COST OF FACILITIES

§ 354. Evidence of Both Historical and Reproduction Cost to Be Considered.

An agency is not precluded from making its determination of value on the basis of evidence of market value only. *Market St. Ry. Co. v. Railroad Commission of State of California* (1945) 324 U. S. 548, 89 L. Ed. 1171, 65 S. Ct. 770. See also § 350.

p. 363, n. 3. Recent cases, in which confiscation was not an issue have, however, held that evidence of reproduction cost need not be admitted or considered by an administrative agency fixing rates under the Natural Gas Act, 15 USC 717 et seq., where the criterion is that the rates must be "just and reasonable." *Panhandle Eastern Pipe Line Co. v. Federal Power Commission*, 324 U. S. 635, 89 L. Ed. 1241, 65 S. Ct. 821; *Colorado-Wyoming Gas Co. v. Federal Power Commission*, 324 U. S. 626, 89 L. Ed. 1235, 65 S. Ct. 850; *Colorado Interstate Gas Co. v. Federal Power Commission*, 324 U. S. 581, 89 L. Ed. 1206, 65 S. Ct. 829; *Federal Power Commission v. Hope Natural Gas Co.*, 320 U. S. 591, 88 L. Ed. 333, 64 S. Ct. 281.

p. 369, n. 5. Under the Natural Gas Act, 15 USC 717 et seq., in controversies where confiscation was not an issue, the determination of the rate base by subtracting depreciation and depletion from original cost and adding to the difference an allowance for working capital was held to be no abuse of discretionary power by the administrative agency. *Panhandle Eastern Pipe Line Co. v. Federal Power Commission* (1945) 324 U. S. 635, 89 L. Ed. 1241, 65 S. Ct. 821; *Colorado Interstate Gas Co. v. Federal Power Commission* (1945) 324 U. S. 581, 89 L. Ed. 1206, 65 S. Ct. 829; *Colorado-Wyoming Gas Co. v. Federal Power Commission* (1945) 324 U. S. 626, 89 L. Ed. 1235, 65 S. Ct. 850; *Federal Power Commission v. Hope Natural Gas Co.* (1944) 320 U. S. 591, 88 L. Ed. 333, 64 S. Ct. 281.

p. 369, n. 8. *Market St. Ry. Co. v. Railroad Commission of State of California* (1945) 324 U. S. 548, 89 L. Ed. 1171, 65 S. Ct. 770.

p. 369, n. 9. *Market St. Ry. Co. v. Railroad Commission of State of California* (1945) 324 U. S. 548, 89 L. Ed. 1171, 65 S. Ct. 770.

§ 355. Historical Cost.

p. 370, n. 15. *Market St. Ry. Co. v. Railroad Commission of State of California* (1945) 324 U. S. 548, 89 L. Ed. 1171, 65 S. Ct. 770. See also § 350.

§ 356. Reproduction Cost.

p. 371, n. 23. See *In re St. Louis Southwestern Ry. Co.* (D. C. E. D. Mo., E. D., 1944) 53 F. Supp. 914.

p. 371, n. 26. In controversies under the Natural Gas Act, 15 USC 717 et seq., where confiscation was not an issue, the valuation determined by the Commission was sustained where it refused to place any reliance either on evidence of reproduction cost new or an original cost trended for price rises since the organization of the company. *Colorado Interstate Gas Co. v. Federal Power Commission* (1945) 324 U. S. 581, 89 L. Ed. 1206, 65 S. Ct. 829.

p. 372, n. 27. *Market St. Ry. Co. v. Railroad Commission of State of California* (1945) 324 U. S. 548, 89 L. Ed. 1171, 65 S. Ct. 770. See also § 350.

§ 360. Prices Paid to Affiliates.

Where selling and buying companies were a third company's wholly-owned subsidiaries and the buying company paid \$5,000,000

for natural gas leaseholds and producing properties which originally cost the seller only \$1,879,500, the Federal Power Commission properly allowed only the latter amount for rate base purposes. *Colorado Interstate Gas Co. v. Federal Power Commission* (1945) 324 U. S. 581, 89 L. Ed. 1206, 65 S. Ct. 829.

b. GOING CONCERN VALUE

§ 361. Nature of Going Concern Value.

p. 376, n. 60. Whether there is going concern value in any case depends upon the financial history of the business. *Federal Power Commission v. Natural Gas Pipeline Co.* (1942) 315 U. S. 575, 86 L. Ed. 1037, 62 S. Ct. 736.

p. 377, n. 62. *Federal Power Commission v. Natural Gas Pipeline Co.* (1942) 315 U. S. 575, 86 L. Ed. 1037, 69 S. Ct. 736.

Maintenance cost of excess plant capacity may not be capitalized and set up as going concern value. *Federal Power Commission v. Natural Gas Pipeline Co.* (1942) 315 U. S. 575, 86 L. Ed. 1037, 62 S. Ct. 736.

Elements relied on for the purpose of demonstrating going concern value were rejected where such items had never been treated as capital expenses, and it did not appear that these had not been recouped from operating expenses during an unregulated period. *Federal Power Commission v. Natural Gas Pipeline Co.* (1942) 315 U. S. 575, 86 L. Ed. 1037, 62 S. Ct. 736.

§ 363. Separate Allowance for Going Concern Value Not Always Necessary.

Valuation of the rate base as a whole places the burden on the regulated company to show that going concern value has neither been adequately covered in the rate base nor recouped from prior earnings of the business. *Federal Power Commission v. Natural Gas Pipeline Co.* (1942) 315 U. S. 575, 86 L. Ed. 1037, 62 S. Ct. 736.

p. 377, n. 67. **Federal Power Commission v. Natural Gas Pipeline Co.* (1942) 315 U. S. 575, 86 L. Ed. 1037, 62 S. Ct. 736.

p. 379, n. 75. *Federal Power Commission v. Natural Gas Pipeline Co.* (1942) 315 U. S. 575, 86 L. Ed. 1037, 62 S. Ct. 736.

c. DEPRECIATION, DEPLETION, AND APPRECIATION

§ 366. Depreciation.

p. 382, n. 1. See *Panhandle Eastern Pipeline Co. v. Federal Power Commission* (1945) 324 U. S. 635, 89 L. Ed. 1241, 65 S. Ct. 821; *Colorado Interstate Gas Co. v. Federal Power Commission* (1945) 324 U. S. 581, 89 L. Ed. 1206, 65 S. Ct. 829; *Federal Power Commission v. Hope Natural Gas Co.* (1944) 320 U. S. 591, 88 L. Ed. 833, 64 S. Ct. 281.

§ 367. Depletion.

p. 383, n. 7a. Depletion pertains exclusively to wasting assets, not the equipment used in the exploitation of such assets. *Choate v. Commissioner of Internal Revenue* (1945) 324 U. S. 1, 89 L. Ed. 653, 65 S. Ct. 469.

For instances where specific deductions from the original cost of wasting assets were made for depletion in the computation of the rate base, see *Panhandle Eastern Pipeline Co. v. Federal Power Commission* (1945) 324 U. S. 635, 89 L. Ed. 1241, 65 S. Ct. 821; *Colorado Interstate Gas Co. v. Federal Power Commission* (1945) 324 U. S. 581, 89 L. Ed. 1206, 65 S. Ct. 829; **Fed-*

eral Power Commission v. Hope Natural Gas Co. (1944) 320 U. S. 591, 88 L. Ed. 333, 64 S. Ct. 281.

There is no constitutional requirement that one who embarks on a wasting asset business of necessarily limited life shall receive in the end more than he put into it. By basing annual depreciation on original cost the utility is made whole and the integrity of the investment maintained. No more is required. Federal Power Commission v. Hope Natural Gas Co. (1944) 320 U. S. 591, 88 L. Ed. 333, 64 S. Ct. 281.

p. 384, n. 9. See Hope Natural Gas Co. v. Federal Power Commission, 134 F. (2d) 287, rev'd on other grounds 320 U. S. 591, 88 L. Ed. 333, 64 S. Ct. 281.

V. GROSS INCOME

§ 369. In General.

See § 370A with respect to allocation of gross income between regulated and unregulated portions of a business embracing both.

VI. OPERATING CHARGES AND EXPENSES

§ 370A. (New) Allocation Between Regulated and Unregulated Business.

The Federal Power Commission must make a segregation of regulated and unregulated business of a company whose activities embrace both. The Commission has discretion to determine what earnings are properly allocable to the unregulated business. The Commission did not abuse this discretion by concluding under certain circumstances that the earnings of an entire business in excess of $6\frac{1}{2}$ per cent return should be allocated to the regulated business. Under the circumstances presented a factual basis was afforded for the action of the Commission in refusing to credit the unregulated business with the larger share of the earnings than $6\frac{1}{2}$ per cent. Panhandle Eastern Pipeline Co. v. Federal Power Commission (1945) 324 U. S. 635, 89 L. Ed. 1241, 65 S. Ct. 821.

Allocation of the cost of services of a company doing both interstate and intrastate business is subject to one of two general considerations:

(1) If Congress has prescribed a formula for the allocation of cost of services of regulated and unregulated business, that of course will be controlling.

(2) Where no such formula is prescribed by Congress, allocation becomes an administrative question. Allocation is purely factual in nature and as a general subject may not be considered an exact science. Different allocation formulas can be used accordingly, so long as they have a basis in fact. Panhandle Eastern Pipeline Co. v. Federal Power Commission (1945) 324 U. S. 635, 89 L. Ed. 1241, 65 S. Ct. 821.

The question of allocation is fundamentally one of fairness, not mathematics. Thus the transmission costs of a pipeline may be determined for the pipeline as a whole, and not on a mileage demand basis, where the business functions as an integrated whole. Panhandle Eastern Pipeline Co. v. Federal Power Commission (1945) 324 U. S. 635, 89 L. Ed. 1241, 65 S. Ct. 821.

The selection by the administrative agency of a particular day for the allocation of the capacity cost component of transmission costs of a pipeline is in effect the determination of an administrative question and will be sustained where the selection is not shown to be unfair. *Panhandle Eastern Pipeline Co. v. Federal Power Commission* (1945) 324 U. S. 635, 89 L. Ed. 1241, 65 S. Ct. 821.

§ 377. Depreciation Allowance; in General.

p. 389, n. 44. * *Federal Power Commission v. Hope Natural Gas Co.* (1944) 320 U. S. 591, 88 L. Ed. 333, 64 S. Ct. 281.

§ 382. — Utility May Use Funds in Depreciation Reserve in Its Discretion.

p. 391, n. 60. See § 377.

§ 383. — Depletion Allowance.

Whether the amortization or depletion base—the value of the property—should be figured from reproduction rather than actual or historical cost is a question which has been expressly left open by the Supreme Court. *Federal Power Commission v. Natural Gas Pipeline Co.* (1942) 315 U. S. 575, 86 L. Ed. 1037, 62 S. Ct. 736.

The period over which depletion or amortization should be figured is that of the entire life of the business. Hence where the entire life of the business is estimated at 23 years, that is the proper period, rather than the 16 years of regulation within that period, especially where depletion was recouped from earnings during the unregulated period. *Federal Power Commission v. Natural Gas Pipeline Co.* (1942) 315 U. S. 575, 86 L. Ed. 1037, 62 S. Ct. 736.

The rate of interest allowable upon depletion or amortization charged has been upheld at 6½ per cent, compounded, where the amortized portion was not deducted from the rate base. *Federal Power Commission v. Natural Gas Pipeline Co.* (1942) 315 U. S. 575, 86 L. Ed. 1037, 62 S. Ct. 736.

p. 391, n. 61. The purpose and justification of a depletion allowance is that it is a means of restoring from current earnings the amount of service capacity of the business consumed in each year. *Federal Power Commission v. Natural Gas Pipeline Co.* (1942) 315 U. S. 575, 86 L. Ed. 1037, 62 S. Ct. 736. See § 367.

p. 391, n. 62. *Federal Power Commission v. Natural Gas Pipeline Co.* (1942) 315 U. S. 575, 86 L. Ed. 1037, 62 S. Ct. 736.

VII. RATE OF RETURN

§ 385. In General.

A public utility cannot be said to suffer injury if a rate is fixed which will probably produce a fair return on the present fair value of its property. If it has lost all value except salvage, the company suffers no loss if it earns a return on salvage value. *Market St. Ry. Co. v. Railroad Commission of State of California* (1945) 324 U. S. 548, 89 L. Ed. 1171, 65 S. Ct. 770.

§ 386. Estimates as to Future Return.

p. 393, n. 74. *Market St. Ry. Co. v. Railroad Commission of State of California* (1945) 324 U. S. 548, 89 L. Ed. 1171, 65 S. Ct. 770.

p. 393, n. 76. *Market St. Ry. Co. v. Railroad Commission of State of California* (1945) 324 U. S. 548, 89 L. Ed. 1171, 65 S. Ct. 770.

§ 387. Amount of Rate of Return: General Standards.

p. 393, n. 78. *Panhandle Eastern Pipeline Co. v. Federal Power Commission* (1945) 324 U. S. 635, 89 L. Ed. 1241, 65 S. Ct. 821; * *Colorado Interstate Gas Co. v. Federal Power Commission* (1945) 324 U. S. 581, 89 L. Ed. 1206, 65 S. Ct. 829; *Federal Power Commission v. Hope Natural Gas Co.* (1944) 320 U. S. 591, 88 L. Ed. 333, 64 S. Ct. 281.

p. 394, n. 79. *Colorado Interstate Gas Co. v. Federal Power Commission* (1945) 324 U. S. 581, 89 L. Ed. 1206, 65 S. Ct. 829.

§ 388. Specific Returns.

A carrier does not have a constitutional right to any specified rate of return on a particular class of service so long as it is not denied a fair return on its business as a whole. *R. C. A. Communications, Inc. v. United States* (D. C. S. D. N. Y., 1942) 43 F. Supp. 851.

p. 396, n. 97. A rate of return of 6½ per cent was held just and reasonable under the Natural Gas Act, 15 USC 717 et seq., for southwestern gas companies in 1942. *Panhandle Eastern Pipeline Co. v. Federal Power Commission* (1945) 324 U. S. 635, 89 L. Ed. 1241, 65 S. Ct. 821; *Colorado-Wyoming Gas Co. v. Federal Power Commission* (1945) 324 U. S. 626, 89 L. Ed. 1235, 65 S. Ct. 850; *Colorado Interstate Gas Co. v. Federal Power Commission* (1945) 324 U. S. 581, 89 L. Ed. 1206, 65 S. Ct. 829.

A return of 6½ per cent for a natural gas company obtaining gas in Texas and selling it in Illinois in 1938 was upheld upon comparison with profits earned by industrial corporations on invested capital and the rate of return on securities of natural gas companies. The fact that the utility's market was exceptionally stable was also considered. *Federal Power Commission v. Natural Gas Pipeline Co.* (1942) 315 U. S. 575, 86 L. Ed. 1037, 62 S. Ct. 736.

VIII. CONFISCATION IN OTHER CASES

§ 398. Tax Cases.

p. 403, n. 53. *Coblentz v. Sparks* (D. C. S. D. Ohio, 1940) 35 F. Supp. 605.

CHAPTER 23

DEPRIVATION OF CITIZENSHIP RIGHTS

§ 400. In General.

See also § 422B.

CHAPTER 24

DENIAL OF EQUAL PROTECTION OF THE LAWS; ADMINISTRATIVE DISCRIMINATION

§ 401. Administrative Discrimination a Matter of Classification.

Where administrative discrimination is systematic, the practical effect of the official breach of law is the same as if the discrimination were incorporated in and proclaimed by the statute. *Snowden v. Hughes* (1944) 321 U. S. 1, 88 L. Ed. 497, 64 S. Ct. 397.

The three situations outlined in this section are governed by uniform principles. *Snowden v. Hughes* (1944) 321 U. S. 1, 88 L. Ed. 497, 64 S. Ct. 397. See also § 402.

"The ultimate test of validity is not whether the classes differ but whether the differences between them are pertinent to the subject with respect to which the classification is made." Mr. Chief Justice Stone in *Asbury Hospital v. Cass County, N. D.* (1945) 326 U. S. 207, 214, 90 L. Ed. 6, 66 S. Ct. 61.

p. 406, n. 1. See *Clarence C. Walker Civic League v. Board of Public Instruction* (C. C. A. 5th, 1946) 154 F. (2d) 726 and *Charleston Federal Savings & Loan Ass'n v. Alderson* (1945) 324 U. S. 182, 89 L. Ed. 857, 65 S. Ct. 624.

p. 406, n. 2. *Clarence C. Walker Civic League v. Board of Public Instruction* (C. C. A. 5th, 1946) 154 F. (2d) 726.

p. 407, n. 3. **Charleston Federal Savings & Loan Ass'n v. Alderson* (1945) 324 U. S. 182, 89 L. Ed. 857, 65 S. Ct. 624; *Clarence C. Walker Civic League v. Board of Public Instruction* (C. C. A. 5th, 1946) 154 F. (2d) 726.

p. 407, n. 4. See *Charleston Federal Savings & Loan Ass'n v. Alderson* (1945) 324 U. S. 182, 89 L. Ed. 857, 65 S. Ct. 624.

The types of administrative action held unconstitutional and void have included rules, regulations, practice, usage and customs of the agency. *Thomas v. Hibbitts* (D. C. Tenn., 1942) 46 F. Supp. 368.

p. 407, nn. 6-8. The same principles are uniformly applicable to administrative discrimination cases, whether in the first situation, that is, discriminatory enforcement against certain members of a class only, see § 407, in the second situation, involving discriminatory application of a statute, see § 408 et seq., or in the third situation, involving discriminatory denial of benefits to members of a class entitled thereto, see § 415 et seq. *Snowden v. Hughes* (1944) 321 U. S. 1, 88 L. Ed. 497, 64 S. Ct. 397.

p. 408, n. 11. *Clarence C. Walker Civic League v. Board of Public Instruction* (C. C. A. 5th, 1946) 154 F. (2d) 726.

§ 402. Administrative Discrimination Actionable Where Systematic and Intentional.

The unlawful administration by a state agency of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present an element of intentional or purposeful discrimination. This may appear on the face of the action, or may only be shown by extrinsic evidence disclosing a discriminatory design not to be inferred from the action itself. A discriminatory purpose is not presumed, and failure to clearly allege such purposeful discrimination results in dismissal of the complaint. **Snowden v. Hughes* (1944) 321 U. S. 1, 88 L. Ed. 497, 64 S. Ct. 397.

Where purposeful discrimination between persons or classes of persons is sufficiently shown, the right to relief under the equal protection clause is not diminished by the fact that the discrimination relates to political rights. *Snowden v. Hughes* (1944) 321 U. S. 1, 88 L. Ed. 497, 64 S. Ct. 397.

These principles are uniformly applicable to administrative discrimination cases whether in the first situation, that is, discriminatory enforcement against certain members of a class only, see § 407, in the second situation, involving discriminatory application of a statute, see § 408 et seq., or in the third situation, involving discriminatory denial of benefits to members of a class entitled thereto, see § 415

et seq. *Snowden v. Hughes* (1944) 321 U. S. 1, 88 L. Ed. 497, 64 S. Ct. 397.

Mere violation of a state statute does not infringe the Constitution. *Snowden v. Hughes* (1944) 321 U. S. 1, 88 L. Ed. 497, 64 S. Ct. 397.

A complaint based upon a claim of administrative discrimination is insufficient where it merely alleges that the denial of a benefit under state laws was "wilful and malicious" and does not allege facts establishing purposeful discrimination between persons or classes of persons. See § 728A.

p. 408, n. 13. *State Agencies. Clarence C. Walker Civic League v. Board of Public Instruction* (C. C. A. 5th, 1946) 154 F. (2d) 726; *Mendez v. Westminster School District of Orange County* (D. C. S. D. Cal., 1946) 64 F. Supp. 544; *Roles v. School Board of City of Newport News* (D. C. E. D. Va., 1945) 61 F. Supp. 395; *Davis v. Cook* (D. C. N. D. Ga., Atlanta Div., 1944) 55 F. Supp. 1004. See *Charleston Federal Savings & Loan Ass'n v. Alderson* (1945) 324 U. S. 182, 89 L. Ed. 857, 65 S. Ct. 624 and *McDaniel v. Board of Public Instruction* (D. C. N. D. Fla., 1941) 39 F. Supp. 638.

Proof of systematic discrimination without direct evidence of intention establishes a *prima facie* case of administrative discrimination. *Hill v. Texas* (1942) 316 U. S. 400, 86 L. Ed. 1559, 62 S. Ct. 1159.

p. 409, n. 15. See *Thomas v. Hibbits* (D. C. Tenn., 1942) 46 F. Supp. 368.

p. 410, n. 19. *Thomas v. Hibbits* (D. C. Tenn., 1942) 46 F. Supp. 368.

§ 403. — Equitable Relief: Adequacy of Remedy at Law.

There is no adequate state remedy where the state itself does not remove the discrimination, but imposes on him against whom the discrimination has been directed the burden of seeking an upward revision of the taxes of other members of the class. **Township of Hillsborough v. Cromwell* (1946) 326 U. S. 620, 90 L. Ed. 358, 66 S. Ct. 445.

The general subject of the requirement that no plain, adequate and complete remedy at law may be had where equitable relief is sought is discussed in § 668 et seq.

The burden of establishing the unconstitutionality of an assessment is on the party making the contention, and in the absence of a finding or persuasive evidence to the contrary the court will not find an assessment to have been intentionally or systematically discriminatory. See *Charleston Federal Savings & Loan Ass'n v. Alderson* (1945) 324 U. S. 182, 89 L. Ed. 857, 65 S. Ct. 624.

p. 410, n. 23. *Township of Hillsborough v. Cromwell* (1946) 326 U. S. 620, 90 L. Ed. 358, 66 S. Ct. 445.

p. 411, n. 25. *Township of Hillsborough v. Cromwell* (1946) 326 U. S. 620, 90 L. Ed. 358, 66 S. Ct. 445.

§ 405. Federal Agencies: Equal Protection and Due Process.

p. 412, n. 36. *Helvering v. Lerner Stores Corp.* (1941) 314 U. S. 463, 86 L. Ed. 343, 62 S. Ct. 341; *United States v. Gordon Kiyoshi Hirabayoshi* (D. C. Wash., 1942) 46 F. Supp. 657.

p. 412, n. 37. See *Bowles v. Willingham* (1944) 321 U. S. 503, 88 L. Ed. 892, 64 S. Ct. 641.

§ 406. State Agencies.

p. 412, n. 38. *Charleston Federal Savings & Loan Ass'n v. Alderson* (1945) 324 U. S. 182, 89 L. Ed. 857, 65 S. Ct. 624; *Mendez v. Westminster School Dis-*

trict of Orange County (D. C. S. D. Calif., 1946) 64 F. Supp. 544. See *Roles v. School Board of City of Newport News* (D. C. E. D. Va., 1945) 61 F. Supp. 395.

p. 413, n. 39. *Davis v. Cook* (D. C. N. D. Ga., Atlanta Div., 1944) 55 F. Supp. 1004.

p. 413, n. 40. It is well settled that where the federal court has jurisdiction, it may pass on the whole case and agreeably with the desired practice decide it on local law questions, without reaching the constitutional issues. * *Township of Hillsborough v. Cromwell* (1946) 326 U. S. 620, 90 L. Ed. 358, 66 S. Ct. 445.

§ 407. First Situation: Discriminatory Enforcement Against Certain Members of Class Only.

An order enforcing a statutory prohibition against departure from filed tariffs by denying carriers the right to render free spotting service at a certain plant was not invalid on the ground of administrative discrimination in that like orders had not been made against the plants of competitors, where each such order was based on an investigation of the traffic conditions prevailing at each particular plant, and the simultaneous suppression of such violations in all plants was impossible as a practical matter. *United States v. Wabash R. Co.* (1944) 321 U. S. 403, 88 L. Ed. 827, 64 S. Ct. 752.

§ 408. Second Situation: Discriminatory Application of Statute.

Administrative discrimination in the application of a statute may also be effected by paying colored school teachers, equally qualified with white teachers, lower compensation than that paid to the white teachers. *Davis v. Cook* (D. C. N. D. Ga., Atlanta Div., 1944) 55 F. Supp. 1004.

p. 414, n. 52. *Township of Hillsborough v. Cromwell* (1946) 326 U. S. 620, 90 L. Ed. 358, 66 S. Ct. 445. See *Charleston Federal Savings & Loan Ass'n v. Alderson* (1945) 324 U. S. 182, 89 L. Ed. 857, 65 S. Ct. 624.

§ 409. — Where Discrimination Is Not Systematic.

Where the official action complained of purports to be in conformity to a permissible statutory classification, an erroneous or mistaken performance of the statutory duty in the absence of a showing of intentional or purposeful discrimination, although a violation of the statute, is not a denial of the equal protection of the laws. *Snowden v. Hughes* (1944) 321 U. S. 1, 88 L. Ed. 497, 64 S. Ct. 397.

Mere error of judgment in valuation is not enough. *Charleston Federal Savings & Loan Ass'n v. Alderson* (1945) 324 U. S. 182, 89 L. Ed. 857, 65 S. Ct. 624.

p. 416, n. 60. *Charleston Federal Savings & Loan Ass'n v. Alderson* (1945) 324 U. S. 182, 89 L. Ed. 857, 65 S. Ct. 624.

p. 416, n. 62. *Charleston Federal Savings & Loan Ass'n v. Alderson* (1945) 324 U. S. 182, 89 L. Ed. 857, 65 S. Ct. 624.

p. 416, n. 63. The burden of establishing the unconstitutionality of a tax assessment is upon the party making the contention. In the absence of any finding or persuasive evidence of discriminatory results or intentional discrimination the valuation of the agency will be upheld. *Charleston Federal Savings & Loan Ass'n v. Alderson* (1945) 324 U. S. 182, 89 L. Ed. 857, 65 S. Ct. 624.

§ 410. — Different Types of Property May Be Valued Differently.

Where a statute requires property assessment at "true and actual value" there is no unlawful administrative discrimination in the assessment of certain intangible property of the same class, such as notes and receivables, at different percentages of face value calculated to reflect the true commercial values of the various securities. See § 412.

§ 412. — When Assessment Not Arbitrary: Examples.

Where the statute provides that all property shall be assessed at its "true and actual value," there is no unlawful discrimination in the assessment of certain intangible property of the same class, such as notes and receivables at varying percentages of face value calculated to reflect the true commercial values of the various securities. *Charleston Federal Savings & Loan Ass'n v. Alderson* (1945) 324 U. S. 182, 89 L. Ed. 857, 65 S. Ct. 624.

§ 413. — Procedure.

Relief from administrative discrimination in tax assessment situations may also be had by action in equity for a declaratory judgment. *Township of Hillsborough v. Cromwell* (1946) 326 U. S. 620, 90 L. Ed. 358, 66 S. Ct. 445. See § 707.

For an instance of judicial review of claims of administrative discrimination under state laws, see *Charleston Federal Savings & Loan Ass'n v. Alderson* (1945) 324 U. S. 182, 89 L. Ed. 857, 65 S. Ct. 624.

§ 415. Third Situation: Discriminatory Denial of Benefits to Member of Class Entitled Thereto; Negro Exclusion Cases.

It cannot lightly be concluded that officers of the court will indulge in unlawful discrimination. *Akins v. Texas* (1945) 325 U. S. 398, 89 L. Ed. 1692, 65 S. Ct. 1276. See § 755.

The burden is on the defendant to establish unlawful discrimination. *Akins v. Texas* (1945) 325 U. S. 398, 89 L. Ed. 1692, 65 S. Ct. 1276. See § 755.

While the Supreme Court will independently examine the evidence where a claim of unlawful discrimination is raised by a motion to quash the indictment, it will accord great respect to the conclusions of the state judiciary on that evidence, inasmuch as the trier of fact who heard the witnesses in full and observed their demeanor on the stand had a better opportunity than a reviewing court to reach a correct conclusion as to the existence of that type of discrimination. The conclusion of the trier on disputed issues will be accepted unless it is so lacking in support in the evidence that to give it effect would work that fundamental unfairness which is at war with due process. *Akins v. Texas* (1945) 325 U. S. 398, 89 L. Ed. 1692, 65 S. Ct. 1276.

Persons working for a daily wage cannot be excluded as a class from jury lists. *Thiel v. Southern Pacific Co.* (1946) 328 U. S. 217, 90 L. Ed. 1181, 66 S. Ct. 984.

It has been held that a school board cannot discriminate against negro children by splitting the school term. *Clarence C. Walker Civic*

League v. Board of Public Instruction (C. C. A. 5th, 1946) 154 F. (2d) 726.

Where a state housing authority afforded equal facilities to both colored and white races, although keeping the two races separate, its action was not discriminatory and did not violate the Fourteenth Amendment. *Favors v. Randall* (D. C. E. D. Pa., 1941) 40 F. Supp. 743.

Segregation of students of Mexican ancestry in separate schools has been held to be unconstitutional as a denial of equal protection of the laws and was enjoined. *Mendez v. Westminster School District of Orange County* (D. C. S. D. Cal., 1946) 64 F. Supp. 544.

Payment by a local school board of a lower schedule of salaries to negro than to white teachers is an unconstitutional discrimination. *McDaniel v. Board of Public Instruction* (D. C. N. D. Fla., 1941) 39 F. Supp. 638; *Roles v. School Board of City of Newport News* (D. C. E. D. Va., 1945) 61 F. Supp. 395.

A *prima facie* case is established by proof of systematic discrimination, even though unaccompanied by direct evidence of intention. *Hill v. Texas* (1942) 316 U. S. 400, 86 L. Ed. 1559, 62 S. Ct. 1159.

The omission from each of two grand jury lists of all but one of the members of a race which composed 15 per cent of the population did not alone prove racial discrimination. *Akins v. Texas* (1945) 325 U. S. 398, 89 L. Ed. 1692, 65 S. Ct. 1276.

p. 420, n. 83. *Akins v. Texas* (1945) 325 U. S. 398, 89 L. Ed. 1692, 65 S. Ct. 1276; *Hill v. Texas* (1942) 316 U. S. 400, 86 L. Ed. 1559, 62 S. Ct. 1159; *Smith v. Texas* (1940) 311 U. S. 128, 85 L. Ed. 84, 61 S. Ct. 164.

p. 420, n. 84. *Akins v. Texas* (1945) 325 U. S. 398, 89 L. Ed. 1692, 65 S. Ct. 1276.

p. 420, n. 85. *Akins v. Texas* (1945) 325 U. S. 398, 89 L. Ed. 1692, 65 S. Ct. 1276; *Smith v. Texas* (1940) 311 U. S. 128, 85 L. Ed. 84, 61 S. Ct. 164.

p. 420, n. 87. *Akins v. Texas* (1945) 325 U. S. 398, 89 L. Ed. 1692, 65 S. Ct. 1276.

p. 420, n. 88. *Akins v. Texas* (1945) 325 U. S. 398, 89 L. Ed. 1692, 65 S. Ct. 1276; *Smith v. Texas* (1940) 311 U. S. 128, 85 L. Ed. 84, 61 S. Ct. 164.

p. 420, n. 89. *Smith v. Texas* (1940) 311 U. S. 128, 85 L. Ed. 84, 61 S. Ct. 164.

Continual exclusion indicates discrimination. *Akins v. Texas* (1945) 325 U. S. 398, 89 L. Ed. 1692, 65 S. Ct. 1276.

p. 420, n. 90. The denial of equal protection by the exclusion of negroes from a jury may be shown by extrinsic evidence of a purposeful discrimination because of race in the administration of a statute fair on its face. *Snowden v. Hughes* (1944) 321 U. S. 1, 88 L. Ed. 497, 64 S. Ct. 397. See *Akins v. Texas* (1945) 325 U. S. 398, 89 L. Ed. 1692, 65 S. Ct. 1276 and *Hill v. Texas* (1942) 316 U. S. 400, 86 L. Ed. 1559, 62 S. Ct. 1159.

§ 416. — Exclusion from Voting.

Refusal by a registrar to register a negro for voting can also be ground for a suit for deprivation of voting rights. *Mitchell v. Wright* (C. C. A. 5th, 1946) 154 F. (2d) 924.

p. 421, n. 91. *Chapman v. King* (C. C. A. 5th, 1946) 154 F. (2d) 460.

The constitutional prohibition of discrimination covers state as well as federal elections. *Chapman v. King* (C. C. A. 5th, 1946) 154 F. (2d) 460.

p. 421, n. 92. *Overruling Grovey v. Townsend* (1935) 295 U. S. 45, 79 L. Ed. 1292, 55 S. Ct. 622, where the statute of a state makes a political party the

agency of the state for the selection, through its primary, of its nominees for the general election, the same tests as to discrimination in the right to vote will be applied to the primary election as to the general election. *Smith v. Allwright* (1944) 321 U. S. 649, 88 L. Ed. 987, 64 S. Ct. 757.

p. 421, n. 93. *Chapman v. King* (C. C. A. 5th, 1946) 154 F. (2d) 460.

CHAPTER 25

FAILURE TO CONFORM TO OTHER CONSTITUTIONAL REQUIREMENTS

§ 422. Deprivation of the Rights of Free Speech and a Free Press.

A city ordinance under which the mayor is authorized to issue permits for solicitation on the city streets when he deems it proper or desirable is contrary to the Fourteenth Amendment if applied to the distribution of religious publications. It is censorship in an extreme form and abridges the freedom of religion, of the press and of speech guaranteed by the fourteenth amendment. *Largent v. Texas* (1943) 318 U. S. 418, 87 L. Ed. 873, 63 S. Ct. 667.

In determining whether a publication is obscene the Postmaster General necessarily passes on a judicial question involving constitutional rights. *Walker v. Popenoe* (App. D. C., 1945) 149 F. (2d) 511.

With respect to the deprivation of free expression in National Labor Relations Board cases, see *May Department Stores Co. v. National Labor Relations Board* (1945) 326 U. S. 376, 90 L. Ed. 145, 66 S. Ct. 203; *National Labor Relations Board v. Virginia Electric & Power Co.* (1941) 314 U. S. 469, 86 L. Ed. 348, 62 S. Ct. 344; *National Labor Relations Board v. American Tube Bending Co.* (C. C. A. 2d, 1943) 134 F. (2d) 993, cert. den. 320 U. S. 768, 88 L. Ed. 1564, 64 S. Ct. 941; *National Labor Relations Board v. Thompson Products, Inc.* (C. C. A. 6th, 1942) 130 F. (2d) 363; *National Labor Relations Board v. Ford Motor Co.* (C. C. A. 6th, 1940) 114 F. (2d) 905, cert. den. 312 U. S. 689, 85 L. Ed. 1126, 61 S. Ct. 621.

§ 422A. (New) Violation of the Reserved Rights of the States Under the Tenth Amendment.

The action of a federal administrative agency must not violate the reserved rights of the states under the Tenth Amendment. See *Northwestern Electric Co. v. Federal Power Commission* (1944) 321 U. S. 119, 88 L. Ed. 596, 64 S. Ct. 451. But the reserved rights of the states under the Tenth Amendment are not interfered with by an order of a federal administrative agency validly made pursuant to appropriate Congressional exercise of the commerce power, inasmuch as the regulatory practices of the states are subordinate to the appropriate exercise by Congress of the commerce power. *Northwestern Electric Co. v. Federal Power Commission* (1944) 321 U. S. 119, 88 L. Ed. 596, 64 S. Ct. 451.

§ 422B. (New) Abridging a Privilege or Immunity of a Citizen of the United States.

The protection extended to citizens of the United States by the privileges and immunities clause of the Fourteenth Amendment includes those rights and privileges which, under the Constitution and laws of the United States, are incident to citizenship of the United States, but does not include rights pertaining to state citizenship and derived solely from the relationship of the citizen and his state established by state law. *Snowden v. Hughes (1944) 321 U. S. 1, 88 L. Ed. 497, 64 S. Ct. 397.

Thus the right to become a candidate for a state office, like the right to vote for the election of state officers, falls outside the protection of this clause of the Constitution. Snowden v. Hughes (1944) 321 U. S. 1, 88 L. Ed. 497, 64 S. Ct. 397.

See also § 400 et seq.

SUBDIVISION IV**JUDICIAL REVIEW OF ADMINISTRATIVE DECISIONS
UPON JUDICIAL QUESTIONS**

CHAPTER 26**THE ADMINISTRATIVE FUNCTION AND JUDICIAL
QUESTIONS****§ 425. Judicial Questions Always Open for Court Decision.**

p. 427, n. 6. Recent cases appearing since the publication of the original work appear to have established the rule that any administrative decision of a judicial question may be entitled to weight or to great weight by the reviewing court. See § 425C.

p. 427, n. 9. Administrative Procedure Act. See the Administrative Procedure Act, Sec. 10(e) and § 249 herein.

Administrator of Wage and Hour Division. Skidmore v. Swift & Co. (1944) 323 U. S. 134, 89 L. Ed. 124, 65 S. Ct. 161.

Alien Cases. See Bridges v. Wixon (1945) 326 U. S. 135, 89 L. Ed. 2103, 65 S. Ct. 1443.

Interstate Commerce Commission. Gregg Cartage & Storage Co. v. United States (1942) 316 U. S. 74, 86 L. Ed. 1283, 62 S. Ct. 932.

National Labor Relations Board. *Republic Steel Corp. v. National Labor Relations Board (1940) 311 U. S. 7, 85 L. Ed. 6, 61 S. Ct. 77.

Price Administrator. Conklin Pen Co. v. Bowles (Em. App., 1945) 152 F. (2d) 764.

Railroad Retirement Board. Railroad Retirement Board v. Bates (App. D. C., 1942) 126 F. (2d) 642.

Securities and Exchange Commission. Securities & Exchange Commission v. Chenery Corp. (1943) 318 U. S. 80, 87 L. Ed. 626, 63 S. Ct. 454.

Social Security Board. *Social Security Board v. Nierotko (1946) 327 U. S. 358, 90 L. Ed. 718, 66 S. Ct. 637; Walter v. Altmeyer (D. C. N. Y., 1942) 46 F. Supp. 790; Morgan v. Social Security Board (D. C. Pa., 1942) 45 F. Supp. 349.

Tax Court. Commissioner of Internal Revenue v. Bedford's Estate (1945)

325 U. S. 283, 89 L. Ed. 1611, 65 S. Ct. 1157; *Claridge Apartments Co. v. Commissioner of Internal Revenue* (1944) 323 U. S. 141, 89 L. Ed. 139, 65 S. Ct. 172; * *Bingham's Trust v. Commissioner of Internal Revenue* (1945) 325 U. S. 365, 89 L. Ed. 1670, 65 S. Ct. 1232; * *Dobson v. Commissioner of Internal Revenue* (1943) 320 U. S. 489, 88 L. Ed. 248, 64 S. Ct. 239; *Commissioner of Internal Revenue v. Heininger* (1943) 320 U. S. 467, 88 L. Ed. 171, 64 S. Ct. 249; *Hormel v. Helvering* (1941) 312 U. S. 552, 85 L. Ed. 1037, 61 S. Ct. 719; *Scaife v. Commissioner of Internal Revenue* (1941) 314 U. S. 459, 86 L. Ed. 339, 62 S. Ct. 338; *Freihofer Baking Co. v. Commissioner of Internal Revenue* (C. C. A. 3rd, 1945) 151 F. (2d) 383; *Stockstrom v. Commissioner of Internal Revenue* (C. C. A. 8th, 1945) 151 F. (2d) 353; *Zanuck v. Commissioner of Internal Revenue* (C. C. A. 9th, 1945) 149 F. (2d) 714; *Barnhill v. Commissioner of Internal Revenue* (C. C. A. 4th, 1945) 148 F. (2d) 913; *Helvering v. Stormfeltz* (C. C. A. 8th, 1944) 142 F. (2d) 982; *Smith v. Helvering* (App. D. C., 1944) 141 F. (2d) 529; *Phipps v. Commissioner of Internal Revenue* (C. C. A. 2d, 1943) 137 F. (2d) 141; *Commissioner of Internal Revenue v. Fiske's Estate* (C. C. A. 7th, 1942) 128 F. (2d) 487, cert. den. 317 U. S. 635, 87 L. Ed. 512, 63 S. Ct. 63; *Commissioner of Internal Revenue v. Wilson* (C. C. A. 7th, 1942) 125 F. (2d) 307. See *Choate v. Commissioner of Internal Revenue* (1945) 324 U. S. 1, 89 L. Ed. 653, 65 S. Ct. 469; *Commissioner of Internal Revenue v. George W. Jones Co.* (C. C. A. 6th, 1945) 152 F. (2d) 358 and *United States v. State Street Trust Co.* (C. C. A. 1st, 1942) 124 F. (2d) 948. But see *Thornley v. Commissioner of Internal Revenue* (C. C. A. 3rd, 1945) 147 F. (2d) 416 and *Hall v. Commissioner of Internal Revenue* (C. C. A. 10th, 1945) 150 F. (2d) 304.

A question of law is not any the less such because the agency's decision of it is right rather than wrong. *Bingham's Trust v. Commissioner of Internal Revenue* (1945) 325 U. S. 365, 89 L. Ed. 1670, 65 S. Ct. 1232. See *Dixie Pine Products Co. v. Commissioner of Internal Revenue* (1944) 320 U. S. 516, 88 L. Ed. 270, 64 S. Ct. 364.

Workmen's Compensation Cases. *Ward v. Cardillo* (App. D. C., 1943) 135 F. (2d) 260.

p. 428, n. 14. *Hormel v. Helvering* (1941) 312 U. S. 552, 85 L. Ed. 1037, 61 S. Ct. 719.

§ 425A. (New) — Mixed Questions of Law and Fact: Whether Facts Found Legally Fit Words of Statute.

An administrative agency, unlike a jury, does not have the contemporaneous guidance of a court on questions of law. But the statutes setting up administrative agencies and establishing factual standards to which the law declared by Congress is to apply necessarily require the agencies to determine in the first instance whether the Act applies to certain parties or to certain factual situations, that is, whether the particular party or factual situation comes within the meaning of the Act. These are mixed questions of law and fact. See §§ 430, 449 et seq. and Stern, *Review of Findings of Administrative Agencies, Juries and Courts*, 58 Harv. L. Rev. 70. They are of the greatest importance to both public and private interests inasmuch as they require construction of the Act and set the scope and limits of the agency's power. In fact, they provide the great bulk of judicial questions which have gone to the courts for review. They are detailed in the chapter on "Particular Judicial Questions." See § 449 et seq.

To illustrate, in the first group are the questions whether a party comes within the meaning of the Act as a "person," "shipper," "common carrier," "contract carrier," "water carrier," "em-

ployer," "employee," "agricultural laborer," "public utility," etc. In the second group are the questions whether a particular factual situation comes within the meaning of the Act so as to constitute "wages," "service," "affiliation," "overtime," "unfair labor practices," a "vicinity," "locality," "through route," "practice," "rebate," "labor dispute," "refusal to bargain," "book," "unfair methods of competition," or being "actually inducted," etc. See § 449 et seq. The administrative process depends uniquely upon the accurate, honest and consistent use of words, from its beginning with the delegation of legislative power establishing factual standards for determination by an agency, through the agency's findings on the factual matters involved, its conclusions of law, and its application of the statutory mandate. Questions as to the meaning of words have always been considered judicial questions. See § 443 et seq. Under the supremacy of law embodied in Article III of the Constitution, questions "arising . . . under the laws of the United States," in cases or controversies are judicial questions for the independent judgment of the reviewing courts. See § 41.

Conversely, factual questions delegated by the legislature to agencies for determination are administrative questions subject to the doctrine of administrative finality. See § 505 et seq.

Hence, the general rationale of the cases involving such mixed questions of law and fact is that the queries as to what are the basic, primary or evidentiary facts are administrative questions for determination by the agency subject to the doctrine of administrative finality; but that the big question as to whether the basic, primary or evidentiary facts found by the agency support or justify an ultimate finding in the language of the statute is a question of law for the independent judgment of the reviewing court. The facts found must meet the legal requirements of the statute. Hence the validity of administrative decisions of mixed questions of law and fact depends principally upon the requirement that ultimate findings must be supported by basic findings. See § 564 et seq.

To illustrate, an ultimate finding that certain rates are "unreasonable," to use the language of the Interstate Commerce Act, is invalid where it is not supported by basic findings of primary or evidentiary facts which demonstrate that the rates are "unreasonable" within the legal meaning of that term. For instance, basic findings that a cat carried on a train was black and had four legs could not as a matter of law support an ultimate finding that the rates involved were "unreasonable." Indeed, except for the requirement of basic findings, an administrative agency could unlawfully exercise power over an unlimited number of parties and factual situations which have no relation to the legal meaning of statutory provisions, through the mere expedient of writing an ultimate finding in the language of the statute. See § 564 et seq. All this serves to emphasize the role which language plays in the relations between government officials and the rest of the people, and the great need in the field of administrative law for accuracy and honesty in the use of words.

The following cases apply the rationale stated:

Alien Cases. Whether the facts which constitute "affiliation" with certain organizations, as defined by the reviewing court, exist in the particular case is an administrative question. *Bridges v. Wixon* (1945) 326 U. S. 135, 89 L. Ed. 2103, 65 S. Ct. 1443.

Director, Bituminous Coal Division. Except to the extent that a set of circumstances deemed by the agency to bring them within the concept "producer" is so unrelated to the tasks entrusted by Congress to the agency as in effect to deny a sensible exercise of judgment, whether a party is a "producer" is an administrative question. *Gray v. Powell* (1941) 314 U. S. 402, 86 L. Ed. 301, 62 S. Ct. 326. See *Indianapolis v. Wheeler* (C. C. A. 7th, 1943) 132 F. (2d) 879, cert. den. 318 U. S. 781, 87 L. Ed. 1149, 63 S. Ct. 859.

Federal Power Commission. *Wisconsin Public Service Corp. v. Federal Power Commission* (C. C. A. 7th, 1945) 147 F. (2d) 743, cert. den. 325 U. S. 880, 89 L. Ed. 1996, 65 S. Ct. 1574, 1575.

Interstate Commerce Commission. *Thomson v. United States* (1944) 321 U. S. 19, 88 L. Ed. 513, 64 S. Ct. 392.

National Labor Relations Board. *Polish National Alliance of the United States of North America v. National Labor Relations Board* (1944) 322 U. S. 643, 88 L. Ed. 1509, 64 S. Ct. 1196. See *National Labor Relations Board v. Hearst Publications* (1944) 322 U. S. 111, 88 L. Ed. 1170, 64 S. Ct. 851.

Securities and Exchange Commission. See *Morgan Stanley & Co. v. Securities & Exchange Commission* (C. C. A. 2d, 1942) 126 F. (2d) 325.

Social Security Board. *Social Security Board v. Nierotko* (1946) 327 U. S. 358, 90 L. Ed. 718, 66 S. Ct. 637.

Tax Court. **Bingham's Trust v. Commissioner of Internal Revenue* (1945) 325 U. S. 365, 89 L. Ed. 1670, 65 S. Ct. 1232. See *Dobson v. Commissioner of Internal Revenue* (1943) 320 U. S. 489, 88 L. Ed. 248, 64 S. Ct. 239; *Commissioner of Internal Revenue v. Heininger* (1943) 320 U. S. 467, 88 L. Ed. 171, 64 S. Ct. 249 and *Hall v. Commissioner of Internal Revenue* (C. C. A. 10th, 1945) 150 F. (2d) 304.

Workmen's Compensation Cases. See *Gulf Oil Corp. v. McManigal* (D. C. N. D. West Va., 1943) 49 F. Supp. 75.

Law Review Article. See R. L. Stern, "Review of Findings of Administrators, Judges and Juries: A Comparative Analysis" (1944) 58 Harv. L. Rev. 70.

This rule has recently been restated as the principle that reviewing courts will set aside administrative decisions only when they announce a rule of general applicability, "that the facts found fall short of meeting statutory requirements." *Bingham's Trust v. Commissioner of Internal Revenue* (1945) 325 U. S. 365, 89 L. Ed. 1670, 65 S. Ct. 1232.

The factual type of condition, thing or activity described by the legal meaning of the words of a particular statutory provision may be broad in character. Many differing states of fact may fit the statutory words, especially in view of the rule that the court will not weigh the evidence and that the drawing of inferences from the evidence is for the agency, not the court. See § 516A. A state of facts

properly found by the agency by weighing the evidence and drawing all reasonable inferences from the evidence may fit the statutory words even though they would not have done so had the evidence been differently weighed and different inferences drawn. See *Bingham's Trust v. Commissioner of Internal Revenue* (1945) 325 U. S. 365, 89 L. Ed. 1670, 65 S. Ct. 1232 and the cases previously cited. Hence the rule that the drawing of all factual inferences is for the agency, not the reviewing court, is a practical factor of great importance. See *Commissioner of Internal Revenue v. Court Holding Co.* (1945) 324 U. S. 331, 89 L. Ed. 981, 65 S. Ct. 707. See also § 516A.

Under the doctrine of administrative finality which excludes certain matters from judicial scrutiny, see § 509 et seq., substantially similar facts or evidence may fit the legal definition of either one of two statutory provisions depending upon which inferences are drawn by the agency, and the administrative agency's choice of provision may thus become binding on the reviewing court as a determination of fact. In *John Kelley Co. v. Commissioner of Internal Revenue* (1946) 326 U. S. 521, 90 L. Ed. 278, 66 S. Ct. 299 it was held that substantially similar corporate payments, as shown by undisputed facts, could fit the legal definition of either the word "interest" or the word "dividends," and that accordingly the determination of the Tax Court as to which they were must be accepted as binding under the doctrine of administrative finality. *John Kelley Co. v. Commissioner of Internal Revenue* (1946) 326 U. S. 521, 90 L. Ed. 278, 66 S. Ct. 299.

It has been held that a reviewing court should remand a case to obtain the decision of an administrative agency on a mixed question of law and fact. *Commissioner of Internal Revenue v. Montague* (C. C. A. 6th, 1942) 126 F. (2d) 948.

§ 425B. (New) — Finality of Administrative Decisions Which Have a "Reasonable Basis in Law"; or Are Not "Clear Cut Mistakes" of Law.

Since publication of the original work, a radically new concept has appeared in the opinions of the Supreme Court with respect to the mixed questions of law and fact described in § 425A. That is the concept that an administrative agency's determination that a certain party or factual situation comes within the meaning of an act is final even though not in accordance with law, if it has a "reasonable basis in law" so that the agency has not made a "clear cut mistake" of law.

The concept is apparently a sudden extension by the Supreme Court of the doctrine of administrative finality, which had theretofore been applicable only to determination of questions of fact, to administrative decisions of law. The phrase "reasonable basis in law" is apparently a paraphrase of the statement stressed in *Rochester Telephone Corp. v. United States* (1939) 307 U. S. 125, 83 L. Ed. 1147, 59 S. Ct. 754, that "the judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body." See § 509. "Reasonable basis in law" was apparently adopted as the equivalent of "rational basis" in fact.

See *Dobson v. Commissioner* (1943) 320 U. S. 489, 88 L. Ed. 248, 64 S. Ct. 239.

The new concept is startling in that, for the first time, it injects into the concept of "law" the notion that conflicting interpretations of a statute need not be resolved in a case of controversy. Where there are two or more interpretations of a statute, they necessarily conflict with each other, a situation which is not bettered by addition of the word "reasonable." Hence, under this new concept an administrative agency may literally roam at will through all the conflicting interpretations of a statute so long as they are "reasonable," with the Supreme and lower courts in which the "judicial power of the United States" is vested under Article III of the Constitution actually committed to uphold any administrative choice of the "reasonable" interpretations and to refrain from construction. Under this concept reasonable differences in law or legal opinion must be resolved by the courts in favor of the administrative agents of the legislature; and the courts vested with judicial power may not reverse an administrative agency on a question of statutory construction as they may a lower court.

The evolution of the concept described has been uneven and anything but clear and consistent. It first appeared, though in different and vague language, in *Gray v. Powell* (1941) 314 U. S. 402, 86 L. Ed. 301, 62 S. Ct. 326. There an administrative decision that a party was a "producer" under the Bituminous Coal Act of 1937 was upheld as having been made in a "just and reasoned manner." The real vitality of the concept came from the *Dobson* case and *National Labor Relations Board v. Hearst Publications* (1944) 322 U. S. 111, 88 L. Ed. 1170, 64 S. Ct. 851. Then, however, the concept was apparently repudiated by the court in *Bingham's Trust v. Commissioner of Internal Revenue* (1945) 325 U. S. 365, 89 L. Ed. 1670, 65 S. Ct. 1232; *Social Security Board v. Nierotko* (1946) 327 U. S. 358, 90 L. Ed. 718, 66 S. Ct. 637, and *Burton-Sutton Oil Co. v. Commissioner of Internal Revenue* (1946) 328 U. S. 25, 90 L. Ed. 1062, 66 S. Ct. 861, only to be abruptly revived in *Unemployment Compensation Commission of Territory of Alaska v. Aragan* (1946) 329 U. S. 143, 91 L. Ed. —, 67 S. Ct. 245.

The new concept is a radical departure from the constitutional and administrative law of the past. The original work listed over two hundred cases in which the reviewing court performed its historic function of construing with finality each statute appropriately presented, despite the fact that an administrative agency had already ventured its construction. See § 449 et seq. Heretofore it has been fundamental to our constitutional system that the court's construction of a statute must be substituted for that of an administrative agency. Moreover, the new concept is incompatible with the supremacy, predominance, or rule of law under which our courts are empowered to control government officials and agencies to the extent of holding them to the law. See §§ 3, 41.

Hence the new concept has no apparent basis in authority; its uneven evolution indicates that it was promulgated without conviction; and in our constitutional system it carries mountainous

implications. It is thus doubtful whether it will endure much longer in the opinions of the Court in the face of the Administrative Procedure Act which specifically charges the reviewing court with the "construction of all constitutional and statutory provisions." (Sec. 10 (e).)

Cases dealing with the concept discussed are set forth below:

Director, Bituminous Coal Division. See *Gray v. Powell* (1941) 314 U. S. 402, 86 L. Ed. 301, 62 S. Ct. 326.

National Labor Relations Board. * *National Labor Relations Board v. Hearst Publications* (1944) 322 U. S. 111, 88 L. Ed. 1170, 64 S. Ct. 851.

Tax Court. *John Kelley Co. v. Commissioner of Internal Revenue* (1946) 326 U. S. 521, 90 L. Ed. 278, 66 S. Ct. 299; * *Bingham's Trust v. Commissioner of Internal Revenue* (1945) 325 U. S. 365, 89 L. Ed. 1670, 65 S. Ct. 1232; *Commissioner of Internal Revenue v. Bedford's Estate* (1945) 325 U. S. 283, 89 L. Ed. 1611, 65 S. Ct. 1157; * *Dobson v. Commissioner of Internal Revenue* (1944) 320 U. S. 489, 88 L. Ed. 248, 64 S. Ct. 239; *Commissioner of Internal Revenue v. George W. Jones Co.* (C. C. A. 6th, 1945) 152 F. (2d) 358; *Chenango Textile Corp. v. Commissioner of Internal Revenue* (C. C. A. 2d, 1945) 148 F. (2d) 296; *Smith v. Helvering* (App. D. C., 1944) 141 F. (2d) 529; *Smith's Estate v. Commissioner of Internal Revenue* (C. C. A. 3rd, 1944) 140 F. (2d) 759.

Unemployment Compensation Commission of Alaska. * *Unemployment Compensation Commission of Territory of Alaska v. Aragan* (1946) 329 U. S. 143, 91 L. Ed. —, 67 S. Ct. 245.

Law Review Article. See R. L. Stern, "Review of Findings of Administrators, Judges and Juries: A Comparative Analysis" (1944) 58 Harv. L. Rev. 70.

§ 425C. (New) — Decision of Agency on Judicial Question Entitled to Great Weight.

The second rule with respect to the validity of administrative construction of statutory provisions, § 479, by which great weight was accorded the administrative construction where it was settled and had received the acquiescence of interested parties, has now been extended into a considerably broader rule that any administrative decision of a question of law may be entitled to weight or to great weight by the reviewing court.

Federal Trade Commission. *Hastings Mfg. Co. v. Federal Trade Commission* (C. C. A. 6th, 1946) 153 F. (2d) 253.

National Labor Relations Board. *National Labor Relations Board v. Hearst Publications* (1944) 322 U. S. 111, 88 L. Ed. 1170, 64 S. Ct. 851; * *Medo Photo Supply Corp. v. National Labor Relations Board* (1944) 321 U. S. 678, 88 L. Ed. 1007, 64 S. Ct. 830; *National Labor Relations Board v. Acme-Evans Co.* (C. C. A. 7th, 1942) 130 F. (2d) 477, cert. den. 318 U. S. 772, 87 L. Ed. 1142, 63 S. Ct. 769.

National Railroad Adjustment Board. See *Virginian Ry. Co. v. System Federation No. 40* (C. C. A. 4th, 1942) 131 F. (2d) 840.

Securities and Exchange Commission. See *Morgan Stanley & Co. v.*

Securities & Exchange Commission (C. C. A. 2d, 1942) 126 F. (2d) 325.

Tax Court. * Bingham's Trust v. Commissioner of Internal Revenue (1945) 325 U. S. 365, 89 L. Ed. 1670, 65 S. Ct. 1232; Commissioner of Internal Revenue v. Bedford's Estate (1945) 325 U. S. 283, 89 L. Ed. 1611, 65 S. Ct. 1157; * Dobson v. Commissioner of Internal Revenue (1943) 320 U. S. 489, 88 L. Ed. 248, 64 S. Ct. 239; Hormel v. Helvering (1941) 312 U. S. 552, 85 L. Ed. 1037, 61 S. Ct. 719; Phipps v. Commissioner of Internal Revenue (C. C. A. 2d, 1943) 137 F. (2d) 141.

In General. See Davis v. Department of Labor & Industries (1942) 317 U. S. 249, 87 L. Ed. 246, 63 S. Ct. 225.

Law Review Note. See note (1942) 56 Harv. L. Rev. 100.

The weight to be accorded a ruling, interpretation or opinion of an administrative agency in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control. Skidmore v. Swift & Co. (1944) 323 U. S. 134, 89 L. Ed. 124, 65 S. Ct. 161. See § 479.

§ 426. — Apparent Exception: Gratuity Cases.

p. 429, n. 18. Administrator of Veterans Affairs. Van Horne v. Hines (App. D. C., 1941) 122 F. (2d) 207, cert. den. 314 U. S. 689, 86 L. Ed. 552, 62 S. Ct. 360; United States v. Gudewicz (D. C. N. Y., 1942) 45 F. Supp. 787.

Secretary of State. Z. & F. Assets Realization Corp. v. Hull (1941) 311 U. S. 470, 85 L. Ed. 288, 61 S. Ct. 351.

Tax Court. United States Electrical Motors v. Jones (App. D. C., 1946) 153 F. (2d) 134; Nolde & Horst Co. v. Helvering (App. D. C., 1941) 122 F. (2d) 41.

§ 427. Administrative "Findings" May Contain Either Administrative or Judicial Conclusions.

p. 431, n. 21. See United States v. State Street Trust Co. (C. C. A. 1st, 1942) 124 F. (2d) 948 and § 425.

§ 429. Substantial Evidence Rule Inapplicable: Technical Questions and Mixed Questions of Law and Fact.

p. 431, n. 24. Helvering v. Bok (C. C. A. 3rd, 1942) 132 F. (2d) 365.

p. 432, n. 25. See § 430.

§ 430. Mixed Questions of Law and Fact.

The question of "domicile" is a mixed question of law and fact. Shilkret v. Helvering (App. D. C., 1943) 138 F. (2d) 925.

Whether a transaction is a "gift" is a mixed question of law and fact. Commissioner of Internal Revenue v. Montague (C. C. A. 6th, 1942) 126 F. (2d) 948.

With respect to finality of administrative decisions of mixed questions of law and fact, see §§ 425A and 425B.

Whether an electric branch line is "operated as a part or parts of a general steam railway system of transportation" is a mixed question of law and fact. City of Yonkers v. United States (1944)

320 U. S. 685, 88 L. Ed. 400, 64 S. Ct. 327. A mixed question of fact and law arises where the issue whether a business expense is "ordinary and necessary" rests upon an independent rule of law. See Commissioner of Internal Revenue v. Heininger (1943) 320 U. S. 467, 88 L. Ed. 171, 64 S. Ct. 249. See also § 425A.

p. 432, n. 27. See §§ 425A, 425B and 449 et seq.

Interstate Commerce Commission. *City of Yonkers v. United States (1944) 320 U. S. 685, 88 L. Ed. 400, 64 S. Ct. 327.

Railroad Retirement Board. Utah Copper Co. v. Railroad Retirement Board (C. C. A. 10th, 1942) 129 F. (2d) 358, cert. den. 317 U. S. 687, 87 L. Ed. 550, 63 S. Ct. 258.

Tax Court. Shilkret v. Helvering (App. D. C., 1943) 138 F. (2d) 925; Ross v. Commissioner of Internal Revenue (C. C. A. 5th, 1942) 129 F. (2d) 310; Commissioner of Internal Revenue v. Fiske's Estate (C. C. A. 7th, 1942) 128 F. (2d) 487, cert. den. 317 U. S. 635, 87 L. Ed. 512, 63 S. Ct. 63; Commissioner of Internal Revenue v. Wilson (C. C. A. 7th, 1942) 125 F. (2d) 307.

Law Review Article. See R. L. Stern, "Review of Findings of Administrators, Judges and Juries: A Comparative Analysis" (1944) 58 Harv. L. Rev. 70.

p. 432, n. 28. The great majority of the judicial questions set forth in § 449 et seq., such as whether a party is an "employee" or other factual noun set forth in a statute, or whether certain facts constitute a "labor dispute," etc., are mixed questions of law and fact. See § 425A.

p. 432, n. 29. Shilkret v. Helvering (App. D. C., 1943) 138 F. (2d) 925; Utah Copper Co. v. Railroad Retirement Board (C. C. A. 10th, 1942) 129 F. (2d) 358, cert. den. 317 U. S. 687, 87 L. Ed. 550, 63 S. Ct. 258; *Rubinkam v. Commissioner of Internal Revenue (C. C. A. 7th, 1941) 118 F. (2d) 148. See § 582.

CHAPTER 27

PARTICULAR JUDICIAL QUESTIONS

I. IN GENERAL

§ 431. Introduction.

p. 435, n. 6. Federal Trade Commission v. Bunte Brothers, Inc. (1941) 312 U. S. 349, 85 L. Ed. 881, 61 S. Ct. 580. See § 449 et seq.

p. 435, n. 7. United States v. Darby (1941) 312 U. S. 100, 85 L. Ed. 609, 61 S. Ct. 451, 132 A. L. R. 1430.

§ 432. Whether Judicial Review Exists.

p. 435, n. 8. See U. S. Electrical Motors, Inc. v. Jones (App. D. C., 1946) 153 F. (2d) 134.

II. QUESTIONS AS TO THE VALIDITY OF ADMINISTRATIVE ACTION

A. Administrative Procedure

§ 435. Composition of Agency.

The proper composition of a "joint board," under Sec. 205b, Motor Carrier Act 1935, as amended by Sec. 20(c), Transportation Act 1940, which acted as an examiner in a certain type of proceeding,

presents a judicial question. *American Trucking Ass'n's Inc. v. United States* (1945) 326 U. S. 77, 89 L. Ed. 2065, 65 S. Ct. 1499.

p. 436, n. 17. *Chicago, B. & Q. R. Co. v. United States* (D. C. E. D. Ky., 1945) 60 F. Supp. 580.

B. Findings and Orders

§ 436. Findings in General.

Whether findings are ambiguous or inconsistent is a judicial question. *Jacksonville Paper Co. v. National Labor Relations Board* (C. C. A. 5th, 1943) 137 F. (2d) 148, cert. den. 320 U. S. 772, 88 L. Ed. 462, 64 S. Ct. 84.

p. 437, n. 20. *City of Yonkers v. United States* (1944) 320 U. S. 685, 88 L. Ed. 400, 64 S. Ct. 327.

p. 437, n. 22. See *Schenley Distillers Corp. v. United States* (1946) 326 U. S. 432, 90 L. Ed. 181, 66 S. Ct. 247. See § 425A.

p. 437, n. 23. * *Mitchell v. United States* (1941) 313 U. S. 80, 85 L. Ed. 1201, 61 S. Ct. 873. See § 425A.

p. 437, n. 24. See § 425A.

p. 438, n. 26. See § 425A.

p. 438, n. 28. *Mitchell v. United States* (1941) 313 U. S. 80, 85 L. Ed. 1201, 61 S. Ct. 873. See § 425A.

§ 437. Whether Findings Support Order.

A judgment in a judicial proceeding must have legal support in the findings. See *Associated Press v. United States* (1945) 326 U. S. 1, 89 L. Ed. 2013, 65 S. Ct. 1416.

In a suit for enforcement of an administrative order, when the party to be affected defaults, the court will only consider whether the findings support the order. *National Labor Relations Board v. Kellburn Mfg. Co.* (C. C. A. 2d, 1945) 149 F. (2d) 686.

p. 438, n. 30. *Administrator of Wage and Hour Division*. See *Walling v. Youngerman-Reynolds Hardwood Co.* (1945) 325 U. S. 419, 89 L. Ed. 1705, 65 S. Ct. 1250.

Federal Trade Commission. *Federal Trade Commission v. A. P. W. Paper Co.* (1946) 328 U. S. 193, 90 L. Ed. 1165, 66 S. Ct. 932; *Jacob Siegel Co. v. Federal Trade Commission*, 327 U. S. 608, 90 L. Ed. 888, 66 S. Ct. 758 (1946); *Federal Trade Commission v. Raladam Co.* (1942) 316 U. S. 149, 86 L. Ed. 1336, 62 S. Ct. 966; *Lane v. Federal Trade Commission* (C. C. A. 9th, 1942) 130 F. (2d) 48.

Interstate Commerce Commission. *Alabama v. United States* (1945) 325 U. S. 535, 89 L. Ed. 1779, 65 S. Ct. 1274; * *North Carolina v. United States* (1945) 325 U. S. 507, 89 L. Ed. 1760, 65 S. Ct. 1260; *Lubetich v. United States* (1942) 315 U. S. 57, 86 L. Ed. 677, 62 S. Ct. 449; *Mitchell v. United States* (1941) 313 U. S. 80, 85 L. Ed. 1201, 61 S. Ct. 873; *Northern Pac. Ry. v. United States* (D. C. D. Minn., Fourth Div., 1941) 41 F. Supp. 439.

National Labor Relations Board. * *May Department Stores Co. v. National Labor Relations Board* (1945) 326 U. S. 376, 90 L. Ed. 145, 66 S. Ct. 203; *Wallace Corp. v. National Labor Relations Board* (1944) 323 U. S. 248, 89 L. Ed. 216, 65 S. Ct. 238; *J. I. Case Co. v. National Labor Relations Board*, 321 U. S. 332, 88 L. Ed. 762, 64 S. Ct. 576; *Virginia Electric & Power Co. v. National Labor Relations Board*, 319 U. S. 533, 87 L. Ed. 1568, 63 S. Ct. 1214; *Southern S. Co. v. National Labor Relations Board* (1942) 316 U. S. 31, 86 L. Ed. 1246, 62 S. Ct. 886; * *National Labor Relations Board v. Express Publishing Co.* (1941) 312 U. S. 426, 85 L. Ed. 930, 61 S. Ct. 693; *National Labor Relations Board v. Federal Engineering Co.* (C. C. A. 6th, 1946) 153 F. (2d) 233;

National Labor Relations Board v. Sun Tent-Leubbert Co. (C. C. A. 9th, 1945) 151 F. (2d) 483; General Motors Corp. v. National Labor Relations Board (C. C. A. 3rd, 1945) 150 F. (2d) 201; National Labor Relations Board v. Lipshutz (C. C. A. 5th, 1945) 149 F. (2d) 141; National Labor Relations Board v. Cleveland-Cliffs Iron Co. (C. C. A. 6th, 1943) 133 F. (2d) 295; National Labor Relations Board v. Sunbeam Electric Co. (C. C. A. 8th, 1943) 133 F. (2d) 856; National Labor Relations Board v. Bradley Lumber Co. (C. C. A. 8th, 1942) 128 F. (2d) 768; Corning Glass Works v. National Labor Relations Board (C. C. A. 2nd, 1941) 118 F. (2d) 625; National Labor Relations Board v. West Kentucky Coal Co. (C. C. A. 6th, 1940) 116 F. (2d) 816; National Labor Relations Board v. Western Massachusetts Electric Co. (C. C. A. 1st, 1941) 120 F. (2d) 455; McQuay-Norris Mfg. Co. v. National Labor Relations Board (C. C. A. 7th, 1941) 119 F. (2d) 1009, cert. den. 313 U. S. 565, 85 L. Ed. 1524, 61 S. Ct. 843; National Labor Relations Board v. Ford Motor Co. (C. C. A. 5th, 1941) 119 F. (2d) 326; Singer Mfg. Co. v. National Labor Relations Board (C. C. A. 7th, 1941) 119 F. (2d) 131, cert. den. 313 U. S. 595, 85 L. Ed. 1549, 61 S. Ct. 1119. See Regal Knitwear Co. v. National Labor Relations Board (1945) 324 U. S. 9, 89 L. Ed. 661, 65 S. Ct. 478.

Price Administrator. L. P. Steuart & Bro. v. Bowles (1944) 322 U. S. 398, 88 L. Ed. 1350, 64 S. Ct. 1097.

Tax Court. Thornley v. Commissioner of Internal Revenue (C. C. A. 3rd, 1945) 147 F. (2d) 416.

Workmen's Compensation Cases. Pate Stevedoring Co. v. Henderson (D. C. Ala., 1942) 44 F. Supp. 12.

p. 439, n. 32. Mitchell v. United States (1941) 313 U. S. 80, 85 L. Ed. 1201, 61 S. Ct. 873.

§ 438. — Where Administrative Sanction Not Prescribed in Terms by Statute.

Courts may not grant an enforcement order or injunction so broad as to make punishable the conduct of persons who act independently and whose rights have not been adjudged according to law. Regal Knitwear Co. v. National Labor Relations Board (1945) 324 U. S. 9, 89 L. Ed. 661, 65 S. Ct. 478.

An order restraining future violation of an Act is justified in covering only those offenses which "bear some resemblance" to that which the party has committed or that "danger of their commission in the future is to be anticipated from the course of his conduct in the past." National Labor Relations Board v. Express Publishing Co. (1941) 312 U. S. 426, 85 L. Ed. 930, 61 S. Ct. 693; May Department Stores Co. v. National Labor Relations Board (1945) 326 U. S. 376, 90 L. Ed. 145, 66 S. Ct. 203.

Judicial questions also include the legal appropriateness of an order directing reimbursement for union dues collected by a company-dominated union, later disestablished, by checkoff from wages. Virginia Electric & Power Co. v. National Labor Relations Board, 319 U. S. 533, 87 L. Ed. 1568, 63 S. Ct. 1214.

Judicial questions also include the legal appropriateness of an order directing an employer to cease and desist from certain acts in connection with collective bargaining. May Department Stores Co. v. National Labor Relations Board (1945) 326 U. S. 376, 90 L. Ed. 145, 66 S. Ct. 203.

See § 755.

p. 439, n. 37. Federal Alcohol Administrator. Strauss v. Berkshire (C. C. A. 8th, 1942) 132 F. (2d) 530.

Federal Trade Commission. Federal Trade Commission v. A. P. W. Paper Co. (1946) 328 U. S. 193, 90 L. Ed. 1165, 66 S. Ct. 932; Jacob Siegel Co. v. Federal Trade Commission, 327 U. S. 608, 90 L. Ed. 888, 66 S. Ct. 758 (1946); Charles of the Ritz Dist. Corp. v. Federal Trade Commission (C. C. A. 2d, 1944) 143 F. (2d) 676.

National Labor Relations Board. * May Department Stores Co. v. National Labor Relations Board (1945) 326 U. S. 376, 90 L. Ed. 145, 66 S. Ct. 203; Virginia Electric & Power Co. v. National Labor Relations Board (1943) 319 U. S. 533, 87 L. Ed. 1568, 63 S. Ct. 1214. See National Labor Relations Board v. Cheney California Lumber Co. (1946) 327 U. S. 385, 90 L. Ed. 739, 66 S. Ct. 553.

p. 440, n. 38. National Labor Relations Board v. Cape County Milling Co. (C. C. A. 8th, 1944) 140 F. (2d) 543.

p. 440, n. 39. Federal Trade Commission. American Chain & Cable Co. v. Federal Trade Commission (C. C. A. 4th, 1944) 142 F. (2d) 909; Parke, Austin & Lipscomb v. Federal Trade Commission (C. C. A. 2d, 1944) 142 F. (2d) 437, cert. den. 323 U. S. 753, 89 L. Ed. 603, 65 S. Ct. 86.

National Labor Relations Board. Virginia Electric & Power Co. v. National Labor Relations Board (1943) 319 U. S. 533, 87 L. Ed. 1568, 63 S. Ct. 1214; Southern S. S. Co. v. National Labor Relations Board (1942) 316 U. S. 31, 86 L. Ed. 1246, 62 S. Ct. 886; International Ass'n of Machinists, Tool & Die Makers Lodge No. 35, v. National Labor Relations Board (1940) 311 U. S. 72, 85 L. Ed. 50, 61 S. Ct. 83, rehearing den. 311 U. S. 729, 85 L. Ed. 474, 61 S. Ct. 314; National Labor Relations Board v. Northwestern Mutual Fire Ass'n (C. C. A. 9th, 1944) 142 F. (2d) 866, cert. den. 323 U. S. 726, 89 L. Ed. 583, 65 S. Ct. 59.

p. 441, n. 44. See Jacob Siegel v. Federal Trade Commission, 327 U. S. 608, 90 L. Ed. 888, 66 S. Ct. 758 (1946).

p. 441, n. 46. Federal Trade Commission v. A. P. W. Paper Co. (1946) 328 U. S. 193, 90 L. Ed. 1165, 66 S. Ct. 932. See Jacob Siegel v. Federal Trade Commission, 327 U. S. 608, 90 L. Ed. 888, 66 S. Ct. 758 (1946).

§ 439. — Administrative Sanction Valid Where Equivalent of Judicial Sanction.

p. 441, n. 47. Bowles v. Lake Lucerne Plaza (C. C. A. 5th, 1945) 148 F. (2d) 967, cert. den. 326 U. S. 726, 90 L. Ed. 430, 66 S. Ct. 31.

§ 440. — Validity of Conditions Imposed.

p. 442, n. 48. Interstate Commerce Commission v. Railway Labor Executives Ass'n (1942) 315 U. S. 373, 86 L. Ed. 904, 62 S. Ct. 717. See United States v. Resler (1941) 313 U. S. 57, 85 L. Ed. 1185, 61 S. Ct. 820.

§ 442. Whether Terms of Order Are Reasonably Clear.

p. 442, n. 52. See Illinois Commerce Commission v. Thomson (1943) 318 U. S. 675, 87 L. Ed. 1075, 63 S. Ct. 834.

III. CONSTRUCTION QUESTIONS

A. Construction of Administrative Writings

§ 442A. (New) General Principles of Construction.

The general subject of construction of statutes and documents is a comprehensive one, outside the scope of this work. The following few statements of principle are taken from leading administrative law cases because of their special pertinency to the field.

§ 442B. (New) — Construction of Statutes.

Statutes delegating powers to public officers must be strictly construed. *United States v. Foster* (C. C. A. 8th, 1942) 131 F. (2d) 3, cert. den. 318 U. S. 767, 87 L. Ed. 1138, 63 S. Ct. 760.

"Legislation introducing a new system is at best empirical, and not infrequently administration reveals gaps or inadequacies of one sort or another that may call for amendatory legislation. But it is no warrant for extending a statute that experience may disclose that it should have been made more comprehensive. 'The natural meaning of words cannot be displaced by reference to difficulties of administration.' . . . For the ultimate question is what has Congress commanded, when it has given no clue to its intentions except familiar English words and no hint by the draftsmen of the words that they meant to use them in any but an ordinary sense. The idea which is now sought to be read into the grant by Congress to the Administrator to define 'the area of production' beyond the plain geographic implications of that phrase is not so complicated nor is English speech so poor that words were not easily available to express the idea or at least to suggest it. After all, legislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him." (Mr. Justice Frankfurter in *Addison v. Holly Hill Fruit Products*, 322 U. S. 607, 617, 88 L. Ed. 1488, 64 S. Ct. 1215.)

In the absence of Congressional mandate, the courts will not adopt a rule of construction, otherwise unjustified, to relieve an administrative agency of what may well be a substantial burden, where such burden is implied by the terms of the legislation when viewed against the background of our form of government. *Davies Warehouse Co. v. Bowles* (1944) 321 U. S. 144, 88 L. Ed. 635, 64 S. Ct. 474.

It is not for the Supreme Court or any other court to so construe a statute as to override the legislative policy clearly and specifically declared by Congress, whatever may be the court's views as to the wisdom of such policy. *McLean Trucking Co. v. United States* (1944) 321 U. S. 67, 88 L. Ed. 544, 64 S. Ct. 370. See *Bowles v. Willingham* (1944) 321 U. S. 503, 88 L. Ed. 892, 64 S. Ct. 641.

The enforcement of retrospective judgment should be avoided by the law as much as possible. *Addison v. Holly Hill Fruit Products* (1944) 327 U. S. 607, 88 L. Ed. 1488, 64 S. Ct. 1215. However, where all the possible dispositions of a case on review involve retroactivity, that disposition will be made which most closely fulfills the statutory design. *Addison v. Holly Hill Fruit Products* (1944) 322 U. S. 607, 88 L. Ed. 1488, 64 S. Ct. 1215. Thus the reviewing court, upon finding an administrative regulation promulgated pursuant to a statute to be partially invalid, will neither attempt to fill in the resulting gap judicially nor ignore the gap in an "either-or" construction, but will remand to the lower court to hold the case in abeyance until the agency has made a new and valid regulation under the Act. *Addison v. Holly Hill Fruit Products* (1944) 322 U. S. 607, 88 L. Ed. 1488, 64 S. Ct. 1215.

There is no better guide in the interpretation of a statute than its purpose and no surer mark of oversolicitude for the letter than to

vince at carrying out that purpose because the words used do not formally quite match with it. *Billik v. Berkshire* (C. C. A. 2d, 1946) 154 F. (2d) 493.

§ 442C. (New) — Construction of Administrative Writings.

A related administrative report and order, and other related administrative documents, should be construed together. See § 446.

The construction upon which an order can be upheld will be adopted where possible. See § 445.

An administrative regulation should not be so construed as to violate the statute. *Commissioner of Internal Revenue v. Netcher* (C. C. A. 7th, 1944) 143 F. (2d) 484, cert. den. 323 U. S. 759, 89 L. Ed. 607, 65 S. Ct. 92.

An administrative order is to be construed like other written instruments, the determinative factor being the intent of the agency as gathered from all parts of the order. *National Labor Relations Board v. Hudson Motor Car Co.* (C. C. A. 6th, 1943) 136 F. (2d) 385.

The meaning of a regulation is a question of law and not the proper subject for testimony of administrative officials upon judicial review. *Consolidated Water Power & Paper Co. v. Bowles* (Em. App., 1945) 150 F. (2d) 960.

The court will construe an administrative regulation so as to accord plain language its literal meaning; to do otherwise is to invade the administrative domain. *Addison v. Holly Hill Fruit Products* (1944) 322 U. S. 607, 88 L. Ed. 1488, 64 S. Ct. 1215.

Administrative orders, like statutes, are not to be given strained and unnatural constructions. *Barron Coop. Creamery v. Wickard* (C. C. A. 7th, 1944) 140 F. (2d) 485.

Words in a regulation must be given their ordinary meaning. *Bowles v. Jung* (D. C. S. D. Cal., 1944) 57 F. Supp. 701.

The express language of a regulation, if clear and unambiguous, must override any general statement of its purpose. *Bowles v. Seventh Avenue Corp.* (C. C. A. 2d, 1945) 150 F. (2d) 819, cert. den. 326 U. S. 780, 90 L. Ed. 472, 66 S. Ct. 336.

Where two regulations must be construed together, the specific regulation will control over the general regulation. *Lockerty v. Phillips* (1943), 319 U. S. 182, 87 L. Ed. 1339, 63 S. Ct. 1019; *Spreckels v. Helvering* (1942) 315 U. S. 626, 86 L. Ed. 1073, 62 S. Ct. 777.

Where an administrative agency is given authority to promulgate regulations, for the violation of which criminal sanctions are to be applied, the regulations so made must be explicit and unambiguous in defining the violations, and they will be construed strictly. See § 504A.

§ 443. Administrative Construction of Agency's Writings Ordinarily Accepted.

Where an agency's order or findings are not free from ambiguity and doubt the case should be remanded to the agency for construction. The agency and not the courts should undertake the task of

clarification. *National Labor Relations Board v. Virginia Electric & Power Co.* (1941) 314 U. S. 469, 86 L. Ed. 348, 62 S. Ct. 344; *Byers Transportation Co. v. United States* (D. C. W. D. Mo., 1942) 48 F. Supp. 550.

p. 443, n. 54. *Administrator of Wage and Hour Division*. See *Walling v. Cohen* (C. C. A. 3rd, 1944) 140 F. (2d) 453.

Interstate Commerce Commission. *Interstate Commerce Commission v. G. & M. Motor Transfer Co., Inc.* (D. C. W. D. N. C., 1945) 64 F. Supp. 302; *Adirondack Transit Lines Inc. v. United States* (D. C. S. D. N. Y., 1945) 59 F. Supp. 503, aff'd 324 U. S. 824, 89 L. Ed. 1393, 65 S. Ct. 95.

National Labor Relations Board. *National Labor Relations Board v. Virginia Electric & Power Co.* (1941) 314 U. S. 469, 86 L. Ed. 348, 62 S. Ct. 344.

p. 443, n. 55. *Commissioner of Internal Revenue*. See *Robinette v. Helvering* (1943) 318 U. S. 184, 87 L. Ed. 700, 63 S. Ct. 540.

Price Administrator. **Bowles v. Seminole Rock and Sand Co.* (1945) 325 U. S. 410, 89 L. Ed. 1700, 65 S. Ct. 1215; *Bowles v. Wheeler* (C. C. A. 9th, 1945) 152 F. (2d) 34, cert. den. 326 U. S. 775, 90 L. Ed. 468, 66 S. Ct. 265. *White v. Bowles* (Em. App., 1945) 150 F. (2d) 408; *Consolidated Water Power & Paper Co. v. Bowles* (Em. App., 1944) 146 F. (2d) 492; *Bowles v. Nuway Laundry* (C. C. A. 10th, 1944) 144 F. (2d) 741, cert. den. 323 U. S. 791, 89 L. Ed. 631, 65 S. Ct. 431; *Goodman v. Bowles* (Em. App., 1943) 138 F. (2d) 917; *Bowles v. Mason* (D. C. N. D. W. Va., 1946) 63 F. Supp. 781; *Bowles v. Ruby* (D. C. D. Mont., 1945) 62 F. Supp. 289; *Bowles v. Ammon* (D. C. D. Neb., 1945) 61 F. Supp. 106. See *Bowles v. Dairymen's League Co-op. Ass'n* (D. C. S. D. N. Y., 1945) 61 F. Supp. 358; *Bowles v. Fruit Growers Co-op.* (D. C. E. D. Wis., 1945) 61 F. Supp. 745.

Social Security Board. *United States v. Lalone* (C. C. A. 9th, 1945) 152 F. (2d) 43.

p. 443, n. 56. *Morgan Stanley & Co. v. Securities & Exchange Commission* (C. C. A. 2d, 1942) 126 F. (2d) 325.

p. 443, n. 57. *Bowles v. Seminole Rock & Sand Co.* (1945) 325 U. S. 410, 89 L. Ed. 1700, 65 S. Ct. 1215. See *Illinois Commerce Commission v. Thomson* (1943) 318 U. S. 675, 87 L. Ed. 1075, 63 S. Ct. 834.

p. 443, n. 58. See *Consolidated Water Power & Paper Co. v. Bowles* (Em. App., 1944) 146 F. (2d) 492.

p. 443, n. 60. An administrative interpretation of an administrative writing will be accorded controlling weight unless plainly erroneous, or inconsistent or out of harmony with the language being interpreted. Compare §§ 478 and 499.

Administrative Procedure Act. Under the Administrative Procedure Act, Sec. 10 (e), "the reviewing court shall . . . determine the meaning or applicability of the terms of any agency action."

Administrator of Wage and Hour Division. See *Walling v. Cohen* (C. C. A. 3rd, 1944) 140 F. (2d) 453.

Interstate Commerce Commission. *Illinois Commerce Commission v. Thomson* (1943), 318 U. S. 675, 87 L. Ed. 1075, 63 S. Ct. 834.

Price Administrator. *Bowles v. Seminole Rock & Sand Co.* (1945) 325 U. S. 410, 89 L. Ed. 1700, 65 S. Ct. 1215; *Bowles v. Simon* (C. C. A. 7th, 1944) 145 F. (2d) 334; *Bowles v. Ruby* (D. C. D. Mont., 1945) 62 F. Supp. 289. See *Bowles v. Mason* (D. C. N. D. W. Va., 1946) 63 F. Supp. 781.

Secretary of Agriculture. *Barron Coop. Creamery v. Wickard* (C. C. A. 7th, 1944) 140 F. (2d) 485.

Administrative orders, like statutes, are not to be given strained and unnatural constructions. *Barron Coop. Creamery v. Wickard* (C. C. A. 7th, 1944) 140 F. (2d) 485.

Tax Court. *Kirby Petroleum Co. v. Commissioner of Internal Revenue* (1946) 326 U. S. 599, 90 L. Ed. 343, 66 S. Ct. 409.

An administrative regulation should not be so construed as to violate the statute. *Commissioner of Internal Revenue v. Netcher* (C. C. A. 7th, 1944) 143 F. (2d) 484, cert. den. 323 U. S. 759, 89 L. Ed. 607, 65 S. Ct. 92.

p. 444, n. 65. See § 252A.

Where the administrative construction is set forth to the court, it may be considered a stipulation. See *United States v. New York Tel. Co.* (1946) 326 U. S. 638, 90 L. Ed. 371, 66 S. Ct. 393. See also §§ 732, 774.

Written, unofficial interpretations of an administrative regulation by employees of the agency are not binding on the administrative body. *Bowles v. Indianapolis Glove Co.* (C. C. A. 7th, 1945) 150 F. (2d) 597. See § 252A.

Newspaper articles do not constitute a binding administrative construction of an administrative regulation. *1165 Park Ave. Corp. v. Bowles* (Em. App., 1945) 150 F. (2d) 117.

A mere statement by a subordinate official in a letter to a private person of the agency's position in a controversy later taken into court does not constitute an administrative construction of its regulation. *Bowles v. Ammon* (D. C. D. Neb., 1945) 61 F. Supp. 106. See § 477.

p. 444, n. 66. An administrative construction of a regulation may also be evidenced by an explanatory bulletin published and distributed by the agency for the purpose. *Bowles v. Seminole Rock & Sand Co.* (1945) 325 U. S. 410, 89 L. Ed. 1700, 65 S. Ct. 1215. See § 489.

§ 444. Administrative Documents to Be Construed by Courts in Absence of Administrative Construction.

p. 444, n. 69. *Administrator of Veterans' Affairs.* *Morgan v. Hines* (1940) 72 App. D. C. 331, 113 F. (2d) 849, cert. den. 311 U. S. 706, 85 L. Ed. 458, 61 S. Ct. 174.

Administrator of Wage and Hour Division. *Walling v. Pearry-Wilson Lumber Co.* (D. C. W. D. La., Shreveport Div., 1943) 49 F. Supp. 846.

Commissioner of Internal Revenue. *Spreckels v. Helvering* (1942) 315 U. S. 626, 86 L. Ed. 1073, 62 S. Ct. 777; *Wade v. Helvering* (1940) 73 App. D. C. 96, 117 F. (2d) 21; *Morrow v. Scofield* (C. C. A. 5th, 1940) 116 F. (2d) 17, cert. den. 313 U. S. 573, 85 L. Ed. 1531, 61 S. Ct. 961; *De Lappe v. Commissioner of Internal Revenue* (C. C. A. 5th, 1940) 113 F. (2d) 48; *Investment Corp. of Philadelphia v. United States* (D. C. E. D. Penn., 1941) 43 F. Supp. 64; *State Street Trust Co. v. Hassett* (D. C. Mass., 1942) 45 F. Supp. 671.

Court of Claims. *S. S. White Dental Mfg. Co. v. United States* (1944) 55 F. Supp. 117.

Price Administrator. *Hulbert v. Twin Falls County, Idaho* (1946) 327 U. S. 103, 90 L. Ed. 560, 66 S. Ct. 444; *Case v. Bowles* (1946) 327 U. S. 92, 90 L. Ed. 552, 66 S. Ct. 438; *Conklin Pen Co. v. Bowles* (Em. App., 1945) 152 F. (2d) 764.

Secretary of the Interior. *United States v. Olson* (D. C. W. D. Ky., Louisville Div., 1941) 41 F. Supp. 433.

p. 444, n. 70. *Lilly v. Grand Trunk Western R. Co.* (1943) 317 U. S. 481, 87 L. Ed. 411, 63 S. Ct. 347.

p. 445, n. 71. *Federal Communications Commission.* *United States v. New York Tel. Co.* (1946) 326 U. S. 638, 90 L. Ed. 371, 66 S. Ct. 393.

National Labor Relations Board. *National Labor Relations Board v. C. Nelson Mfg. Co.* (C. C. A. 8th, 1941) 120 F. (2d) 444; *National Labor Relations Board v. Giannasca* (C. C. A. 2d, 1941) 119 F. (2d) 756; *Corning Glass Works v. National Labor Relations Board* (C. C. A. 2nd, 1941) 118 F. (2d) 625; *Republic Steel Corp. v. National Labor Relations Board* (C. C. A. 3rd, 1940) 114 F. (2d) 820.

Secretary of Agriculture. *M. H. Remken Dairy Co. v. Wickard* (D. C. N. Y. 1942) 45 F. Supp. 332.

p. 445, n. 72. *Walling v. Cohen* (C. C. A. 3rd, 1944) 140 F. (2d) 453.

p. 445, n. 74. *Penker Const. Co. v. Cardillo*, 73 App. D. C. 168, 118 F. (2d) 14.

p. 446, n. 78. *National Labor Relations Board v. American Potash & Chemical Corp.* (C. C. A. 9th, 1941) 118 F. (2d) 630.

§ 445. Construction Upon Which Order Can Be Upheld Will Be Adopted Where Possible.

p. 447, n. 82. *California Lumbermen's Council v. Federal Trade Commission* (C. C. A. 9th, 1940) 115 F. (2d) 178, cert. den. 312 U. S. 709, 85 L. Ed. 1141, 61 S. Ct. 827. See *Morgan v. Helvering* (C. C. A. 2d, 1941) 117 F. (2d) 334; *Morrow v. Scofield* (C. C. A. 5th, 1940) 116 F. (2d) 17, cert. den. 313 U. S. 573, 85 L. Ed. 1531, 61 S. Ct. 961.

§ 446. Report and Order Should Be Construed Together: Related Documents.

p. 447, n. 83. See *W. R. Grace & Co. v. Civil Aeronautics Board* (C. C. A. 2d, 1946) 154 F. (2d) 271.

*B. Construction of Statutes***§ 449. In General.**

p. 448, n. 89. See § 425 et seq.; *Railroad Retirement Board v. Bates* (App. D. C., 1942) 126 F. (2d) 642.

Administrative Procedure Act. Under the Administrative Procedure Act, Sec. 10 (e), ". . . the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action."

p. 449, n. 91. The cases cited in this footnote are cases dealing with the scope of an agency's statutory power. Questions of the constitutional power of an agency as the administrative arm of the legislature are discussed elsewhere. See § 261.

In the last analysis, all questions of statutory construction are questions controlling the scope of the agency's power. See the cases cited in the balance of this chapter, and *Social Security Board v. Nierotko* (1946) 327 U. S. 358, 90 L. Ed. 718, 66 S. Ct. 637.

Administrative Procedure Act. See the Administrative Procedure Act, Sec. 10(e).

Administrator of Veterans' Affairs. *Morgan v. Hines* (1940) 72 App. D. C. 331, 113 F. (2d) 849; cert. den. 311 U. S. 706, 85 L. Ed. 458, 61 S. Ct. 174.

Administrator of Wage and Hour Division. *Addison v. Holly Hill Fruit Products* (1944) 322 U. S. 607, 88 L. Ed. 1488, 64 S. Ct. 1215; *Lorenzetti v. American Trust Co.* (D. C. Cal., S. D., 1942) 45 F. Supp. 128.

Federal Alcohol Administration. *Strauss v. Berkshire* (C. C. A. 8th, 1942) 132 F. (2d) 530; *Monarch Distributing Co. v. Alexander* (C. C. A. 7th, 1941) 119 F. (2d) 953.

Federal Communications Commission. *Southwestern Bell Telephone Co. v. United States* (D. C. Mo., W. D., 1942) 45 F. Supp. 403.

Federal Power Commission. *Colorado-Wyoming Gas Co. v. Federal Power Commission* (1945) 324 U. S. 581, 89 L. Ed. 1206, 65 S. Ct. 829; *Northwestern Electric Co. v. Federal Power Commission* (1944) 321 U. S. 119, 88 L. Ed. 596, 64 S. Ct. 451.

Federal Trade Commission. *Federal Trade Commission v. Bunte Brothers, Inc.* (1941) 312 U. S. 349, 85 L. Ed. 881, 61 S. Ct. 580; *Fashion Originators' Guild of America, Inc. v. Federal Trade Commission* (1941) 312 U. S. 457, 85 L. Ed. 949, 61 S. Ct. 703.

Interstate Commerce Commission. *United States v. Pennsylvania R. Co.* (1945) 323 U. S. 612, 89 L. Ed. 499, 65 S. Ct. 471; *Chicago, St. P., M. & O. Ry. Co. v. United States* (1944) 322 U. S. 1, 88 L. Ed. 1093, 64 S. Ct. 842; *United States v. Resler* (1941) 313 U. S. 57, 85 L. Ed. 1185, 61 S. Ct. 820.

National Labor Relations Board. *National Labor Relations Board v. Electric Vacuum Cleaner Co.* (1942) 315 U. S. 685, 86 L. Ed. 1120, 62 S. Ct. 846; *Phelps Dodge Corp. v. National Labor Relations Board* (1941) 313 U. S. 177, 85 L. Ed. 1271, 61 S. Ct. 845, 133 A. L. R. 1217.

Postmaster General. *Hannegan v. Esquire* (1946) 327 U. S. 146, 90 L. Ed. 586, 66 S. Ct. 456.

Secretary of Agriculture. * *Stark v. Wickard* (1944) 321 U. S. 288, 88 L. Ed. 733, 64 S. Ct. 559.

Social Security Board. "An agency may not finally decide the limits of its statutory power. That is a judicial function." Mr. Justice Reed in * *Social Security Board v. Nierotko* (1946) 327 U. S. 358, 90 L. Ed. 718, 66 S. Ct. 637.

State Agencies. *Connecticut Light & Power Co. v. Federal Power Commission* (1945) 324 U. S. 515, 89 L. Ed. 1150, 65 S. Ct. 749; *Texas Co. v. Alton R. Co.* (C. C. A. 7th, 1940) 117 F. (2d) 210, cert. den. sub nom. *Funks Grove Grain Co. v. Alton R. Co.* (1941) 313 U. S. 570, 85 L. Ed. 1528, 61 S. Ct. 947, rehearing den. 313 U. S. 600, 85 L. Ed. 1552, 61 S. Ct. 1109.

Tax Court. *Security Flour Mills Co. v. Commissioner of Internal Revenue* (1944) 321 U. S. 281, 88 L. Ed. 725, 64 S. Ct. 596.

War Relocation Authority. The extent of the powers delegated to the War Relocation Authority is a judicial question. *Ex parte Mitsuye Endo* (1944) 323 U. S. 283, 89 L. Ed. 243, 65 S. Ct. 208.

p. 450, n. 92. *Commissioner of Internal Revenue v. Gooch Mill & Elevator Co.*, 320 U. S. 418, 88 L. Ed. 139, 64 S. Ct. 184 (1943).

p. 453, n. 98. See *Bridges v. Wixon* (1945) 326 U. S. 135, 89 L. Ed. 2103, 65 S. Ct. 1443 and § 425A.

§ 450. Whether Power Is in Federal or State Agency.

p. 455, n. 16. *Connecticut Light & Power Co. v. Federal Power Commission* (1945) 324 U. S. 515, 89 L. Ed. 1150, 65 S. Ct. 749. See also § 558A.

§ 451. Jurisdiction.

It requires clear language to demonstrate that Congress intended an agency to have unreviewable authority to determine its own jurisdiction. *U. S. Electrical Motors, Inc. v. Jones* (App. D. C., 1946) 153 F. (2d) 134. This is aside from constitutional questions, see § 41 et seq.

Whether, by consent of the parties, an agency can acquire or be divested of jurisdiction, is a judicial question. *National Labor Relations Board v. General Motors Corp.* (C. C. A. 7th, 1940) 116 F. (2d) 306.

p. 455, n. 19. **Alien Cases.** *Espino v. Wixon* (C. C. A. 9th, 1943) 136 F. (2d) 96.

Director of the Bituminous Coal Division. *Keystone Mining Co. v. Gray* (C. C. A. 3rd, 1941) 120 F. (2d) 1.

National Labor Relations Board. *National Labor Relations Board v. Central Missouri Telephone Co.* (C. C. A. 8th, 1940) 115 F. (2d) 563; *National Labor Relations Board v. Western Massachusetts Electric Co.* (C. C. A. 1st, 1941) 120 F. (2d) 455.

Selective Service Boards. * *Estep v. United States* (1946) 327 U. S. 114, 90 L. Ed. 567, 66 S. Ct. 423.

p. 456, n. 20. *United States v. Pennsylvania R. Co.* (1945) 323 U. S. 612, 89 L. Ed. 428, 65 S. Ct. 471.

p. 456, n. 21. **Administrator of Wage and Hour Division.** *United States v. American Trucking Ass'n, Inc.* (1940) 310 U. S. 534, 84 L. Ed. 1345, 60 S. Ct. 1059; rehearing den. 311 U. S. 724, 85 L. Ed. 472, 61 S. Ct. 53.

Interstate Commerce Commission. *City of Yonkers v. United States* (1944) 320 U. S. 685, 88 L. Ed. 400, 64 S. Ct. 327; *United States v. American Trucking Ass'n, Inc.* (1940) 310 U. S. 534, 84 L. Ed. 1345, 60 S. Ct. 1059; rehearing den. 311 U. S. 724, 85 L. Ed. 472, 61 S. Ct. 53.

United States Employees' Compensation Commission. *Parker v. Motor Boat Sales, Inc.* (1941) 314 U. S. 244, 86 L. Ed. 184, 62 S. Ct. 221.

United States Processing Tax Board of Review. *Fuhrman & Foster Co. v. Commissioner of Internal Revenue* (C. C. A. 7th, 1940) 114 F. (2d) 863, cert.

den. 312 U. S. 686, 85 L. Ed. 1123, 61 S. Ct. 613; Tennessee Consolidated Coal Co. v. Commissioner of Internal Revenue (C. C. A. 6th, 1941) 117 F. (2d) 452.

p. 457, n. 23. United States v. Pennsylvania R. Co. (1945) 323 U. S. 612, 89 L. Ed. 499, 65 S. Ct. 471. See U. S. Electrical Motors, Inc. v. Jones (App. D. C., 1946) 153 F. (2d) 134.

§ 452. — "Jurisdictional Facts."

p. 457, n. 29. Espino v. Wixon (C. C. A. 9th, 1943) 136 F. (2d) 96.

§ 453. — Whether Interstate Commerce Is Involved.

p. 458, n. 31. Federal Power Commission. Colorado-Wyoming Gas Co. v. Federal Power Commission (1945) 324 U. S. 581, 89 L. Ed. 1206, 65 S. Ct. 829.

Interstate Commerce Commission. United States v. Capital Transit Co. (1945) 325 U. S. 357, 89 L. Ed. 1663, 65 S. Ct. 1176.

Whether tugboat operations commencing and ending in the same state, but traversing harbor waters of another state are "interstate commerce" is a judicial question. Cornell Steamboat Co. v. United States (1944) 321 U. S. 634, 88 L. Ed. 978, 64 S. Ct. 768. See City of Yonkers v. United States (1944) 320 U. S. 685, 88 L. Ed. 400, 64 S. Ct. 327.

§ 454. Whether Administrative Regulation Is Authorized by Statute.

p. 458, n. 33. See §§ 478 and 499.

Administrator of Wage and Hour Division. Addison v. Holly Hill Fruit Products (1944) 322 U. S. 607, 88 L. Ed. 1488, 64 S. Ct. 1215.

Collector of Customs. United States v. Myers (1944) 320 U. S. 561, 88 L. Ed. 312, 64 S. Ct. 337.

Commissioner of Internal Revenue. Commissioner of Internal Revenue v. Wheeler (1945) 324 U. S. 542, 89 L. Ed. 1166, 65 S. Ct. 799; Douglas v. Commissioner of Internal Revenue (1944) 322 U. S. 275, 88 L. Ed. 1271, 64 S. Ct. 988.

Federal Security Administrator. United States v. Lord-Mott Co. (D. C. D. Md., 1944) 57 F. Supp. 128.

National Labor Relations Board. Whether an administrative rule is within the statutory authority is judicial question. Wallace Corp. v. National Labor Relations Board (1944) 323 U. S. 248, 89 L. Ed. 216, 65 S. Ct. 238.

Social Security Board. * Social Security Board v. Nierotko (1946) 327 U. S. 358, 90 L. Ed. 718, 66 S. Ct. 637.

In General. Whether a rule of procedure promulgated by an administrative agency is authorized by the statute is a judicial question. Vinson v. Washington Gas Light Co. (1944) 321 U. S. 489, 88 L. Ed. 883, 64 S. Ct. 731.

§ 456. Extent of Agency's Statutory Duty.

p. 460, n. 43. City of Yonkers v. United States (1944) 320 U. S. 685, 88 L. Ed. 400, 64 S. Ct. 327.

p. 460, n. 44. Ecker v. Western Pacific R. Corp. (1943) 318 U. S. 448, 87 L. Ed. 892, 63 S. Ct. 692.

§ 456A. (New) Questions Under the Fair Labor Standards Act.

Judicial questions under the Fair Labor Standards Act also include: Whether the authority of the Wage and Hour Administrator to issue orders fixing minimum wages, implemented with such terms and conditions as he finds necessary to carry out the purpose of such orders and to prevent evasion, includes authority to prohibit homework in a certain industry, Gemsco v. Walling (1945) 324 U. S. 244, 89 L. Ed. 921, 65 S. Ct. 605; what constitutes the working time

which makes up the work week of underground mine employees within the meaning of section 70 of the Act, *Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of America* (1945) 325 U. S. 161, 89 L. Ed. 1534, 65 S. Ct. 1063; and whether "wages" include tips, *Williams v. Jacksonville Terminal Co.* (1942) 315 U. S. 286, 86 L. Ed. 914, 62 S. Ct. 659.

§ 457. Questions Under the Immigration Laws.

Judicial questions also include: What facts constitute "affiliation" with certain organizations under the Immigration Act of 1917 as amended by the Act of June 1940, 8 USC 137. *Bridges v. Wixon* (1945) 326 U. S. 135, 89 L. Ed. 2103, 65 S. Ct. 1443.

§ 458. Questions Under the Interstate Commerce Act and Related Statutes.

§ 459. — Questions of Definition or Legal Meaning.

Judicial questions include: Whether a person is a "common carrier by water," *Cornell Steamboat Co. v. United States*, 321 U. S. 634, 88 L. Ed. 978, 64 S. Ct. 768 (see § 539); "common carrier by motor vehicle," *Thomson v. United States* (1944) 321 U. S. 19, 88 L. Ed. 513, 64 S. Ct. 392; or a "contract carrier," *United States v. N. E. Rosenblum Truck Lines, Inc.* (1942) 315 U. S. 50, 86 L. Ed. 671, 62 S. Ct. 445; whether the "adequate and more efficient or more economical transportation" which justifies a through route involving short hauling refers to carrier operations or a broader public interest embracing service and rates to shippers, *Pennsylvania R. Co. v. United States* (1945) 323 U. S. 588, 89 L. Ed. 419, 65 S. Ct. 543; whether railroads are under a duty, enforceable by the Commission, to provide interchanges of cars with water carriers, *United States v. Pennsylvania R. Co.* (1945) 323 U. S. 612, 89 L. Ed. 428, 65 S. Ct. 471; and whether the outright purchase by a subsidiary carrier, controlled by a noncarrier, of the property and operating rights of another carrier is "control" of the latter by the noncarrier within the meaning of the Act, *United States v. Marshall Transport Co.* (1944) 322 U. S. 31, 88 L. Ed. 1110, 64 S. Ct. 899.

What constitutes present or future "public convenience and necessity" as the requisite for the abandonment of a railroad line, is a judicial question. *Purcell v. United States* (1942) 315 U. S. 381, 86 L. Ed. 910, 62 S. Ct. 709. See also § 568.

Whether an electric branch line is "operated as a part of a general steam railroad system" is a judicial question. *City of Yonkers v. United States* (1944) 320 U. S. 685, 88 L. Ed. 400, 64 S. Ct. 327. See § 430.

p. 461, n. 56. *Howard Hall Co. Inc. v. United States* (1942) 315 U. S. 495, 86 L. Ed. 986, 62 S. Ct. 732; *United States v. Carolina Freight Carriers Corp.* (1942) 315 U. S. 475, 86 L. Ed. 971, 62 S. Ct. 722; *Lubetich v. United States* (1942) 315 U. S. 57, 86 L. Ed. 677, 62 S. Ct. 449.

p. 462, n. 65. *United States v. Capital Transit Co.* (1945) 325 U. S. 357, 89 L. Ed. 1663, 65 S. Ct. 1176.

§ 461. — Questions Concerning Tariffs.

Whether a tariff violates a statute is a judicial question. *Columbus & Greenville Ry. Co. v. United States* (D. C. Miss., 1942) 46 F. Supp. 204.

§ 461A. (New) — Miscellaneous Questions.

Miscellaneous judicial questions under the Interstate Commerce Act include: Whether the Act empowers the Commission to authorize carrier services greater than those asked for by the petitioner for a certificate, *Chicago, St. P., M. & O. Ry. Co. v. United States* (1944) 322 U. S. 1, 88 L. Ed. 1093, 64 S. Ct. 842; and questions concerning the priority of claims in a reorganization proceeding under the Bankruptcy Act. *Ecker v. Western Pac. R. Corp.* (1943) 318 U. S. 448, 87 L. Ed. 892, 63 S. Ct. 692.

§ 461B. (New) Questions Under the Emergency Price Control Act.

Judicial questions arising under the Emergency Price Control Act of 1942, 50 USC App. 901 et seq., include whether a warehouse is a "public utility" within the terms of the Act. *Davies Warehouse Co. v. Bowles* (1944) 321 U. S. 144, 88 L. Ed. 635, 64 S. Ct. 474.

§ 461C. (New) Questions Under the Federal Alcohol Administration Act.

Whether the provision forbidding a grant of a basic permit to one who has been convicted of a felony at the "date of application" applies to a person convicted after filing an application but before action thereon and before the filing of an amended application, is a judicial question. *Monarch Distributing Co. v. Alexander* (C. C. A. 7th, 1941) 119 F. (2d) 953.

§ 462. Questions Under the Federal Communications Act.

Judicial questions also include whether a construction permit applicant has had a fair hearing under the Act. *Ashbacker Radio Corp. v. Federal Communications Commission* (1945) 326 U. S. 327, 90 L. Ed. 108, 66 S. Ct. 148. See also § 274 et seq.

§ 462A. (New) Questions Under the Federal Power Act.

Judicial questions under the Federal Power Act include: Whether the Federal Power Commission has jurisdiction over a company which receives electric power solely for local distribution within a state, *Connecticut Light & Power Co. v. Federal Power Commission* (1945) 324 U. S. 515, 89 L. Ed. 1150, 65 S. Ct. 749; what constitutes a "facility," *Jersey Central Power & Light Co. v. Federal Power Commission* (1943) 319 U. S. 61, 87 L. Ed. 1258, 63 S. Ct. 953; and what constitutes a "public utility," *Jersey Central Power & Light Co. v. Federal Power Commission* (1943) 319 U. S. 61, 87 L. Ed. 1258, 63 S. Ct. 953.

§ 463. Questions Under the Federal Trade Commission Act and Related Statutes.

p. 463, n. 81. **Federal Trade Commission.** *Federal Trade Commission v. Bunte Brothers, Inc.* (1941) 312 U. S. 349, 85 L. Ed. 881, 61 S. Ct. 580; * *Ford Motor Co. v. Federal Trade Commission* (C. C. A. 6th, 1941) 120 F. (2d) 175; *Gimbel Bros., Inc. v. Federal Trade Commission* (C. C. A. 2d, 1941) 116 F. (2d) 578; *Biddle Purchasing Co. v. Federal Trade Commission* (C. C. A. 2nd, 1938) 96 F. (2d) 687, cert. den. 305 U. S. 634, 83 L. Ed. 407, 59 S. Ct. 101.

p. 464, n. 82. **Fashion Originators' Guild of America, Inc. v. Federal Trade Commission** (1941) 312 U. S. 457, 85 L. Ed. 949, 61 S. Ct. 703.

§ 464. Questions Under the National Labor Relations Act.

The legal definition of the phrase "unfair labor practices" is a matter for judicial decision; it must be sharply distinguished from the administrative question whether a particular employer has been guilty of certain acts which may or may not constitute unfair labor practices as a matter of law. See *Polish Nat. Alliance of the United States of North America v. National Labor Relations Board* (1944) 322 U. S. 643, 88 L. Ed. 1509, 64 S. Ct. 1196 and *National Labor Relations Board v. Ford Motor Co.* (C. C. A. 6th, 1940) 114 F. (2d) 905, cert. den. 312 U. S. 689, 85 L. Ed. 1126, 61 S. Ct. 621. See also § 425A et seq.

"If the facts before the Board were such that all reasonable minds must honestly draw the same conclusion from them with respect to what would constitute an appropriate bargaining unit, that question would become a question of law, rather than one of fact. In such a situation, a wrong determination of the question by the Board would be subject to reversal as being purely arbitrary." (Mr. Justice Sanborn in *Pittsburgh Plate Glass Co. v. National Labor Relations Board* (C. C. A. 8th, 1940) 113 F. (2d) 698, aff'd 313 U. S. 146, 85 L. Ed. 1271, 61 S. Ct. 908, rehearing den. 313 U. S. 599, 85 L. Ed. 1551, 61 S. Ct. 1093.)

Judicial questions under the National Labor Relations Act also include whether the hearing provided for under Sec. 9(c) of the Act must be before or after an election. *Inland Empire District Council v. Millis* (1945) 325 U. S. 697, 89 L. Ed. 1877, 65 S. Ct. 1316.

p. 465, n. 86. **Phelps Dodge Corp. v. National Labor Relations Board** (1941) 313 U. S. 177, 85 L. Ed. 1271, 61 S. Ct. 845, 133 A. L. R. 1217. See *National Labor Relations Board v. Hearst Publications* (1944) 322 U. S. 111, 88 L. Ed. 1170, 64 S. Ct. 851 and §§ 425C and 479, as to the extent that an agency's interpretation of a statute will be accepted by the reviewing court.

p. 465, n. 87. **National Labor Relations Board v. Carroll** (C. C. A. 1st, 1941) 120 F. (2d) 457.

§ 465. Questions Under the Railway Labor Act.

Judicial questions under the Railway Labor Act include whether an award determined by the Railway Adjustment Board was validly made, that is, grounded on correct principles of law. *Elgin, J. & E. Ry. Co. v. Burley* (1945) 325 U. S. 711, 89 L. Ed. 1886, 65 S. Ct. 1282. Expressly left open is the judicial question as to the finality and conclusive effect of an award validly made by the Adjustment Board.

Elgin, J. & E. Ry. Co. v. Burley (1945) 325 U. S. 711, 89 L. Ed. 1886, 65 S. Ct. 1282.

§ 465A. (New) Questions Under the Railroad Retirement Act.

Whether a party is an "employer" within the meaning of the Railroad Retirement Act of 1937 is a judicial question. Railroad Retirement Board v. Duquesne Warehouse Co. (1946) 326 U. S. 446, 90 L. Ed. 192, 66 S. Ct. 238.

Whether a party is an "employee" within the meaning of the Act is also a judicial question. Utah Copper Co. v. Railroad Retirement Board (C. C. A. 10th, 1942) 129 F. (2d) 358, cert. den. 317 U. S. 687, 87 L. Ed. 550, 63 S. Ct. 258.

§ 465B. (New) Questions Under the Railroad Unemployment Insurance Act.

Whether a party is an "employer" within the meaning of the Railroad Unemployment Insurance Act of 1938 is a judicial question. Railroad Retirement Board v. Duquesne Warehouse Co. (1946) 326 U. S. 446, 90 L. Ed. 192, 66 S. Ct. 238.

§ 468. Questions Under the Public Land Acts.

The meaning of the word "provident" is a judicial question. United States v. Eastman (C. C. A. 9th, 1941) 118 F. (2d) 421.

§ 469. Questions Under Various Revenue Laws.

In every case where a court vested with judicial power under Article III of the Constitution redeicides a question upon which the Tax Court or other administrative agency has already made a decision, an identification of that question as judicial in nature is necessarily made. Such cases are very numerous and the only judicial questions listed herein are those which are identified as such in the judicial opinions with some degree of articulateness. Hence, judicial questions under various revenue laws also include: What constitutes an "economic interest" under a Treasury Regulation, Kirby Petroleum Co. v. Commissioner of Internal Revenue (1946) 326 U. S. 599, 90 L. Ed. 343, 66 S. Ct. 409; where traveling expenses in pursuit of business are deductible from income where incurred while away from home, the meaning of "home," Commissioner of Internal Revenue v. Flowers (1946) 326 U. S. 465, 90 L. Ed. 203, 66 S. Ct. 250; whether a distribution, pursuant to reorganization, of earnings and profits "has the effect of the distribution of a taxable dividend" within Sec. 112 (c) (2) of the Revenue Act of 1936, Commissioner of Internal Revenue v. Bedford's Estate (1945) 325 U. S. 283, 89 L. Ed. 1611, 65 S. Ct. 1157; whether state or federal law determines the time at which a declared stock dividend is "accrued" to a stockholder under Sec. 42 of the Internal Revenue Code, Putnam's Estate v. Commissioner of Internal Revenue (1945) 324

U. S. 393, 89 L. Ed. 1023, 65 S. Ct. 811; whether money consideration must benefit the donor to relieve a transfer by him from being a gift, *Commissioner of Internal Revenue v. Wemyss* (1945) 324 U. S. 303, 89 L. Ed. 958, 65 S. Ct. 652; whether gifts under a trust are of "future interests," *Fondren v. Commissioner of Internal Revenue* (1945) 324 U. S. 18, 89 L. Ed. 668, 65 S. Ct. 499; what constitutes a "gain," or "profit," *Commissioner of Internal Revenue v. Wilcox* (1946) 327 U. S. 404, 90 L. Ed. 752, 66 S. Ct. 546; what constitutes "taxable income," *Commissioner of Internal Revenue v. Wilcox* (1946) 327 U. S. 404, 90 L. Ed. 752, 66 S. Ct. 546; under what circumstances deduction or credits should be taken as of a period other than that in which the amount was paid or accrued "in order to clearly reflect the income," *Security Flour Mills Co. v. Commissioner of Internal Revenue* (1944) 321 U. S. 281, 88 L. Ed. 725, 64 S. Ct. 596; the date upon which the decision of the Board of Tax Appeals, after denial of a petition for certiorari, becomes final, *R. Simpson & Co. v. Commissioner of Internal Revenue* (1944) 321 U. S. 225, 88 L. Ed. 688, 64 S. Ct. 496; whether a taxpayer under obligation to file two returns satisfies the obligation so as to start the statute of limitations running by filing one return only, *Commissioner of Internal Revenue v. Lane-Wells Co.* (1944) 321 U. S. 219, 88 L. Ed. 684, 64 S. Ct. 511; whether a tax on floor stocks of cotton is a "processing tax" within the Agricultural Adjustment Act, *B. F. Goodrich Co. v. United States* (1944) 321 U. S. 126, 88 L. Ed. 602, 64 S. Ct. 471; whether a distribution to stockholders is a "capital distribution" or a corporate dividend from "earnings and profits," *Commissioner of Internal Revenue v. Fisher* (1946) 327 U. S. 512, 90 L. Ed. 818, 66 S. Ct. 686; whether the method of calculation followed by the Tax Court in redetermining income tax is forbidden by applicable statute or regulation, *Dobson v. Commissioner of Internal Revenue* (1943) 320 U. S. 489, 88 L. Ed. 248, 64 S. Ct. 239; whether "first domestic processing" of foreign oils, in the Revenue Act of 1934, means first processing in the United States, or first after the effective date of the Act, *Colgate-Palmolive-Peet Co. v. United States*, 320 U. S. 422, 88 L. Ed. 143, 64 S. Ct. 227 (1943); what criterion should be applied to determine the value of stock, *Zanuck v. Commissioner of Internal Revenue* (C. C. A. 9th, 1945) 149 F. (2d) 714; *Helvering v. Maytag* (C. C. A. 8th, 1942) 125 F. (2d) 55, cert. den. 316 U. S. 689, 86 L. Ed. 1760, 62 S. Ct. 1280; whether a taxpayer may claim as a gross income deduction a tax liability which he is currently contesting in the state courts, *Dixie Pine Products Co. v. Commissioner of Internal Revenue* (1944) 320 U. S. 516, 88 L. Ed. 270, 64 S. Ct. 364; whether the facts found constitute a "gift," *Helvering v. American Dental Co.* (1943) 318 U. S. 322, 87 L. Ed. 785, 63 S. Ct. 577 (see § 425A); what legal test is to be applied in determining in what year a loss occurred, *Smith v. Helvering* (App. D. C., 1944) 141 F. (2d) 529; and whether the settlor of a trust retains substantial ownership, *Helvering v. Bok* (C. C. A. 3rd, 1942) 132 F. (2d) 365.

p. 467, n. 1. *Virginian Hotel Corp. of Lynchburg v. Helvering* (1943), 319 U. S. 523, 87 L. Ed. 1561, 63 S. Ct. 1260.

§ 469A. (New) Questions Under the Second War Powers Act.

Whether the Price Administrator, as delegate of the President's power under the Second War Powers Act, 50 USC App. 633 to "allocate" materials, has power to issue a suspension order against a retailer and withhold materials from him on the finding that he has acquired and distributed rationed materials in violation of ration regulations, is a judicial question. *L. P. Steuart & Bro. v. Bowles* (1944) 322 U. S. 398, 88 L. Ed. 1350, 64 S. Ct. 1097.

§ 469B. (New) Questions Under the Securities and Exchange and Related Acts.

Judicial questions under the Securities and Exchange and related Acts include: Whether a party is a "person or party aggrieved" so as to have a right under Sec. 24(a) of the Public Utility Holding Company Act to judicial review of an order of the Securities and Exchange Commission, *American Power & Light Co. v. Securities & Exchange Commission* (1945) 325 U. S. 385, 89 L. Ed. 1683, 65 S. Ct. 1254 (see § 188 et seq.); whether in the simplification of a solvent holding company system, pursuant to the Public Utility Holding Company Act, 150 USC 79 et seq., the rights of stockholders to distribution of assets may be evaluated on the basis of a going business, and not as a liquidation, *Otis & Co. v. Securities & Exchange Commission* (1945) 323 U. S. 624, 89 L. Ed. 511, 65 S. Ct. 483; and what constitutes the "vicinity" of a particular exchange, *National Ass'n of Securities Dealers v. Securities & Exchange Commission* (C. C. A. 3rd, 1944) 143 F. (2d) 62.

§ 469C. (New) Questions Under the Selective Service Act.

Judicial questions under the Selective Training and Service Act, 50 USC App. 311, include what facts establish that a selectee becomes "actually inducted" within the meaning of the Act. *Billings v. Truesdell* (1944) 321 U. S. 542, 88 L. Ed. 917, 64 S. Ct. 737. See, however, §§ 267, 425A.

§ 469D. (New) Questions Under the Shipping Act of 1916.

Judicial questions under the Shipping Act of 1916, 46 USC 801, include: Whether a certain business is carried on "in connection with" a common carrier by water, *United States v. American Union Transport Inc.* (1946) 327 U. S. 437, 90 L. Ed. 772, 66 S. Ct. 644; what constitutes a "person" subject to the Act; and whether power to prescribe a "just and reasonable regulation or practice" includes as a subject discrimination resulting from noncompensatory wharf demurrage or storage charges, *California v. United States* (1944) 320 U. S. 577, 88 L. Ed. 322, 64 S. Ct. 352.

§ 469E. (New) Questions Under the Social Security Act.

Judicial questions under the Social Security Act include: What constitutes "service," * *Social Security Board v. Nierotko* (1946) 327 U. S. 358, 90 L. Ed. 718, 66 S. Ct. 637; what constitutes "wages,"

* *Social Security Board v. Nierotko* (1946) 327 U. S. 358, 90 L. Ed. 718, 66 S. Ct. 637; *Morgan v. Social Security Board* (D. C. M. D. Pa., 1942) 45 F. Supp. 349; and when death benefits are payable to a widow, *Kandelin v. Kandelin* (D. C. N. Y. 1942) 45 F. Supp. 341.

§ 470. Questions Under the Tariff Acts.

Judicial questions also include what constitutes "overtime" under the Tariff Act of 1930, 19 USC 1401 et seq.; and whether authority under the Act to regulate daily working hours of customs inspectors includes the use of the "shift" system. *United States v. Myers* (1944) 320 U. S. 561, 88 L. Ed. 312, 64 S. Ct. 337.

§ 471. Questions Under Workmen's Compensation Acts.

Judicial questions under Workmen's Compensation Acts also include: Whether a barge without motive power of its own is a "vessel" under the Longshoremen's Compensation Act, *Norton v. Warner Co.* (1944) 321 U. S. 565, 88 L. Ed. 931, 64 S. Ct. 747; and whether an injury arose out of and in course of employment, *Ward v. Cardillo* (App. D. C., 1943) 135 F. (2d) 260.

C. Construction of Documents

§ 473. In General.

An administrative construction of a letter of taxpayer was given weight in *United States v. Kales* (1941) 314 U. S. 186, 86 L. Ed. 132, 62 S. Ct. 214. The administrative construction of a contract peculiarly within the agency's knowledge may be entitled to great weight. See *Virginian Ry. Co. v. System Federation No. 40* (C. C. A. 4th, 1942) 131 F. (2d) 840.

In construing a trust instrument, it is within the province of the administrative body to initially decide questions of local law, although the questions are judicial. *Commissioner of Internal Revenue v. Lewis* (C. C. A. 3rd, 1944) 141 F. (2d) 221.

Judicial questions also include questions of construction of letters, *United States v. Kales* (1941) 314 U. S. 186, 86 L. Ed. 132, 62 S. Ct. 214; speeches and statements, *National Labor Relations Board v. Virginia Electric & Power Co.* (1941) 314 U. S. 469, 86 L. Ed. 348, 62 S. Ct. 344; and trust declarations, *MacManus v. Commissioner of Internal Revenue* (C. C. A. 6th, 1942) 131 F. (2d) 670; *Commissioner of Internal Revenue v. Wilson* (C. C. A. 7th, 1942) 125 F. (2d) 307.

p. 468, n. 12. *Commissioner of Internal Revenue. United States v. Kales* (1941) 314 U. S. 186, 86 L. Ed. 132, 62 S. Ct. 214.

National Labor Relations Board. National Labor Relations Board v. Virginia Electric & Power Co. (1941) 314 U. S. 469, 86 L. Ed. 348, 62 S. Ct. 344; *National Labor Relations Board v. American Potash & Chemical Corp.* (C. C. A. 9th, 1941) 118 F. (2d) 630.

National Railroad Adjustment Board. Virginian Ry. Co. v. System Federation No. 40 (C. C. A. 4th, 1942) 131 F. (2d) 840.

*Tax Court. *Thornley v. Commissioner of Internal Revenue* (C. C. A. 3rd, 1945) 147 F. (2d) 416, quoting this section, *vom Baur*, Federal Administrative

Law; *Lum v. Commissioner of Internal Revenue* (C. C. A. 3rd, 1945) 147 F. (2d) 356; *MacManus v. Commissioner of Internal Revenue* (C. C. A. 6th, 1942) 131 F. (2d) 670; *Commissioner of Internal Revenue v. Lewis* (C. C. A. 3rd, 1944) 141 F. (2d) 221; *Welsbach Engineering & Management Corp. v. Commissioner of Internal Revenue* (C. C. A. 3rd, 1944) 140 F. (2d) 584, cert. den. 322 U. S. 751, 88 L. Ed. 1581, 64 S. Ct. 1261; *Commissioner of Internal Revenue v. Wilson* (C. C. A. 7th, 1942) 125 F. (2d) 307; * *Commissioner of Internal Revenue v. Buck* (C. C. A. 2d, 1941) 120 F. (2d) 775.

p. 468, n. 13. *Welsbach Engineering & Management Corp. v. Commissioner of Internal Revenue* (C. C. A. 3rd, 1944) 140 F. (2d) 584, cert. den. 322 U. S. 751, 88 L. Ed. 1581, 64 S. Ct. 1261; *Lum v. Commissioner of Internal Revenue* (C. C. A. 3rd, 1945) 147 F. (2d) 356; *National Labor Relations Board v. American Potash & Chemical Corp.* (C. C. A. 9th, 1941) 118 F. (2d) 630.

§ 474A. (New) Construction of a Contract: May Present Judicial or Administrative Question Under the Railway Labor Act.

Just as the construction of a tariff may be either a judicial or administrative question, Sec. 474, the construction of a contract or an agreement concerning rates of pay, rules, or working conditions has been held to present an administrative question under the Railway Labor Act, where words were not used in their ordinary meanings. *Order of Railway Conductors v. Pitney* (1946) 326 U. S. 561, 90 L. Ed. 318, 66 S. Ct. 322.

D. (New) Construction of Testimony and Verbal Statements

§ 474B. (New) In General.

Questions of construction of testimony and verbal statements are judicial questions for the independent judgment of the reviewing court. *Jacksonville Paper Co. v. National Labor Relations Board* (C. C. A. 5th, 1943) 137 F. (2d) 148, cert. den. 320 U. S. 772, 88 L. Ed. 462, 64 S. Ct. 84. See § 422.

"It is not for this Court to say that the Examiner and the Board were in error in believing the testimony of one witness over another. That is the peculiar province of the Board. But the Court is not without power to interpret or construe the testimony of the witnesses whom the Board and the Examiner have chosen to believe. It is within the province of the Court to determine whether or not words spoken and actions taken amount, as a matter of law, to unfair labor practices under Section 8 of the Act. It is the province of the Board to determine whether words were spoken or acts were done. However, the legal effect of the words spoken or acts done, and a determination of whether or not they amount to a violation of the Act, may be a legal question and within the power of the Court to determine." Judge Waller in *Jacksonville Paper Co. v. National Labor Relations Board* (C. C. A. 5th 1943) 137 F. (2d) 148, 150, cert. den. 320 U. S. 772, 88 L. Ed. 462, 64 S. Ct. 84. See § 425A and compare § 516.

CHAPTER 28

WEIGHT OF ADMINISTRATIVE DECISION OF
JUDICIAL QUESTIONS: ADMINISTRA-
TIVE CONSTRUCTION**§ 475. In General.**

When an administrative agency interprets a statute so as to make it apply to particular circumstances, it acts as delegate of the legislative power. * *Social Security Board v. Nierotko* (1946) 327 U. S. 358, 90 L. Ed. 718, 66 S. Ct. 637. See also §§ 249 and 425 et seq.

The old rule that an administrative construction of a judicial question would be entitled to weight by the reviewing court only where the construction had some additional force, as where it had become settled and had received the acquiescence of interested parties, has now apparently been broadened into a general rule that any administrative decision of a judicial question may be entitled to weight or to great weight. See § 425C.

§ 476. Administrative Construction in General.

With respect to administrative construction of a taxpayer's letter, see *United States v. Kales* (1941), 314 U. S. 186, 86 L. Ed. 132, 62 S. Ct. 214. See also § 473.

§ 477. What Constitutes an Administrative Construction.

Rulings of the Commissioner of Internal Revenue in isolated cases submitted to him do not commit the Department to any interpretation of the law. *Oberwinder v. Commissioner of Internal Revenue* (C. C. A. 8th, 1945) 147 F. (2d) 255. See § 252A.

Notes of the Secretary of State which were later disregarded could not constitute an administrative construction. *United States v. Birnbaum* (D. C. S. D. N. Y., 1944) 55 F. Supp. 356.

An administrative construction promulgated in a regulation can only be changed by another regulation. *F. Uri & Co. v. Bowles* (C. C. A. 9th, 1945) 152 F. (2d) 713.

The interpretative bulletins and informal rulings of the Administrator of Wages and Hours constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. *Skidmore v. Swift & Co.* (1944) 323 U. S. 134, 89 L. Ed. 124, 65 S. Ct. 161.

An administrative construction may also be disclosed by circulars issued by the Public Lands Department of the Secretary of the Interior, *Great Northern Ry. Co. v. United States* (1942) 315 U. S. 262, 86 L. Ed. 836, 62 S. Ct. 529, and by a form for reporting a tax which necessarily adopts a method of computing a tax. *Americal Chicle Co. v. United States* (1942) 316 U. S. 450, 86 L. Ed. 1591, 62 S. Ct. 1144.

Conduct and the language of informal letters may constitute an administrative construction. *Arenas v. United States* (1944) 322 U. S. 419, 88 L. Ed. 1363, 64 S. Ct. 1090.

Neither circulars prepared and distributed by an agency, nor a casual statement by an officer in the court of a Congressional hearing necessarily constitute an administrative construction. See *United States v. Stewart* (1940) 311 U. S. 60, 85 L. Ed. 40, 61 S. Ct. 102, rehearing den. 311 U. S. 729, 85 L. Ed. 475, 61 S. Ct. 390.

Acquiescence of the Commissioner of Internal Revenue in a Tax Court decision affecting a regulation, followed by action inconsistent with the withdrawal of the regulation, is not a sufficiently definite administrative practice to provide a basis for a judicial decision invalidating the regulation on the strength of the acquiescence. *Douglas v. Commissioner of Internal Revenue* (1944) 322 U. S. 275, 88 L. Ed. 1271, 64 S. Ct. 988.

The construction by various agencies of a word used in a number of statutes, as tending to show consistent governmental usage or interpretation of the term, may be entitled to weight. *Roland Electrical Co. v. Walling* (1946) 326 U. S. 657, 90 L. Ed. 383, 66 S. Ct. 413. For instance, where the Administrator of the Wage and Hour Division is given jurisdiction for certain purposes over employees engaged in the production of goods for commerce, not engaged in "retail" establishments, the construction of the word "retail" by the Bureau of the Census, the Bureau of the Budget, and the Social Security Board was accorded weight. *Roland Electrical Co. v. Walling* (1946) 326 U. S. 657, 90 L. Ed. 383, 66 S. Ct. 413. Also, two or more agencies may be given power to administer an act, and weight may be accorded to the construction of the statute by each. *Boutell v. Walling* (1946) 327 U. S. 463, 90 L. Ed. 786, 66 S. Ct. 631. See *Social Security Board v. Nierotko* (1946) 327 U. S. 358, 90 L. Ed. 718, 66 S. Ct. 637.

An attempt by the Governor of the Canal Zone to work an employee overtime without pay, in the teeth of the statute and the Comptroller General's ruling, could not be accorded weight in construing the statute governing overtime. *United States v. Townsley* (1945) 323 U. S. 557, 89 L. Ed. 454, 65 S. Ct. 413.

Administrative Procedure Act. See the definition of "Rule" and "Rule making" in the Administrative Procedure Act, § 2 (c).

p. 474, n. 9. *Higgins v. Commissioner of Internal Revenue* (1941) 312 U. S. 212, 85 L. Ed. 397, 61 S. Ct. 475, rehearing den. 312 U. S. 714, 85 L. Ed. 1145, 61 S. Ct. 728.

p. 474, n. 10. *Commissioner of Internal Revenue v. Realty Operators, Inc.* (C. C. A. 5th, 1941) 118 F. (2d) 286.
See the cases cited in § 479.

p. 474, n. 11. *Administrator of Wage and Hour Division. Skidmore v. Swift & Co.* (1944) 323 U. S. 134, 89 L. Ed. 124, 65 S. Ct. 161. See *Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of America* (1945) 325 U. S. 161, 897, 89 L. Ed. 1534, 2007, 65 S. Ct. 1063, 1550.

Commissioner of Internal Revenue. * *United Pocahontas Coal Co. v. United States* (C. C. A. 4th, 1941) 117 F. (2d) 175. See *Glass City Bank v. United States* (1945) 326 U. S. 265, 90 L. Ed. 56, 66 S. Ct. 108.

General counsel's memoranda being merely communications from counsel to the Commissioner, and containing advice for his guidance, not the taxpayer's, do not constitute rules or regulations on which a taxpayer may rely as a construction of a statute. *Van Dyke v. Commissioner of Internal Revenue* (C. C. A. 9th, 1941) 120 F. (2d) 945.

Secretary of the Navy. See *Mine Safety Appliances Co. v. Forrestal* (1945) 326 U. S. 371, 90 L. Ed. 140, 66 S. Ct. 219.

p. 475, n. 12. **Commissioner of Internal Revenue.** *Heininger v. Commissioner of Internal Revenue* (C. C. A. 7th, 1943) 133 Fed. 567, aff'd 320 U. S. 467, 88 L. Ed. 171, 64 S. Ct. 249.

Federal Trade Commission. *Federal Trade Commission v. Bunte Brothers, Inc.* (1941) 312 U. S. 349, 85 L. Ed. 881, 61 S. Ct. 580.

Price Administrator. *Perkins v. Brown* (D. C. S. D. Ga., Savannah Div., 1943) 53 F. Supp. 176.

Secretary of the Interior. *United States v. Eastman* (C. C. A. 9th, 1941) 118 F. (2d) 421.

State Agencies. See *United States v. Oklahoma Gas & Electric Co.* (1943) 318 U. S. 206, 87 L. Ed. 716, 63 S. Ct. 534.

United States Employees' Compensation Commission. *Parker v. Motor Boat Sales, Inc.* (1941) 314 U. S. 244, 86 L. Ed. 184, 62 S. Ct. 221.

p. 475, n. 13. *Helvering v. Reynolds* (1941) 313 U. S. 428, 85 L. Ed. 1438, 61 S. Ct. 971, 134 A. L. R. 1155.

An administrative construction which was not definite enough to be considered an established construction was not given weight in *Mineral Mining Co. v. United States* (D. C. Wis., 1942) 46 F. Supp. 503.

p. 475, n. 14. See *Higgins v. Commissioner of Internal Revenue* (1941) 312 U. S. 212, 85 L. Ed. 397, 61 S. Ct. 475, rehearing den. 312 U. S. 714, 85 L. Ed. 1145, 61 S. Ct. 728 and § 151A. But see *Federal Trade Commission v. Bunte Brothers, Inc.* (1941) 312 U. S. 349, 85 L. Ed. 881, 61 S. Ct. 580.

p. 476, n. 19. **Administrator of Wage and Hour Division.** *West Kentucky Coal Co. v. Walling* (C. C. A. 6th, 1946) 153 F. (2d) 582.

Commissioner of Internal Revenue. *Claridge Apartments Co. v. Commissioner of Internal Revenue* (1944) 323 U. S. 141, 89 L. Ed. 139, 65 S. Ct. 172; *Helvering v. Edison Bros.* (C. C. A. 8th, 1943) 133 F. (2d) 575, cert. den. 319 U. S. 752, 87 L. Ed. 1706, 63 S. Ct. 1166.

Farm Loan Board. *United States v. Stewart* (1940) 311 U. S. 60, 85 L. Ed. 40, 61 S. Ct. 102, rehearing den. 311 U. S. 729, 85 L. Ed. 475, 61 S. Ct. 390.

p. 476, n. 22. *Niagara Falls Power Co. v. Federal Power Commission* (C. C. A. 2d, 1943) 137 F. (2d) 787, cert. den. 320 U. S. 792, 88 L. Ed. 477, 64 S. Ct. 206.

§ 478. First Rule: Administrative Construction Never Material if Plainly Erroneous or Meaning of Statute Is Clear.

An administrative construction of a statutory term is applicable only insofar as it does not conflict with the judicial construction of the term. To the extent that it leads to a result different from that reached by the courts, it must be disapproved. *Thomson v. United States* (1944) 321 U. S. 19, 88 L. Ed. 513, 64 S. Ct. 392.

An administrative agency is not bound by an erroneous construction of a statute on the theory of estoppel. See § 252A.

p. 476, n. 23. **Administrator of Wage and Hour Division.** *Walling v. Baltimore Steam Packet Co.* (C. C. A. 4th, 1944) 144 F. (2d) 130; *Walling v. L. Wiemann Co.* (C. C. A. 7th, 1943) 138 F. (2d) 602, cert. den. 321 U. S. 785, 88 L. Ed. 1077, 64 S. Ct. 782.

Commissioner of Internal Revenue. *Helvering v. Credit Alliance Corp.* (1942) 316 U. S. 107, 86 L. Ed. 1307, 62 S. Ct. 989; *Oberwinder v. Commissioner of Internal Revenue* (C. C. A. 8th, 1945) 147 F. (2d) 255; *Commissioner of Internal Revenue v. Aluminum Co. of America* (C. C. A. 3rd, 1944) 142 F. (2d) 663, cert. den. 323 U. S. 728, 89 L. Ed. 585, 65 S. Ct. 64.

Interstate Commerce Commission. See *Interstate Commerce Commission v. Railway Labor Executives Ass'n* (1942) 315 U. S. 373, 86 L. Ed. 904, 62 S. Ct. 717.

p. 476, n. 24. **Administrator of Wage and Hour Division.** *Addison v. Holly Hill Fruit Products* (1944) 322 U. S. 607, 88 L. Ed. 1438, 64 S. Ct. 1215;

Walling v. L. Wiemann Co. (C. C. A. 7th, 1943) 138 F. (2d) 602, cert. den. 321 U. S. 785, 88 L. Ed. 1077, 64 S. Ct. 782.

Commissioner of Internal Revenue. Helvering v. Credit Alliance Corp. (1942) 316 U. S. 107, 86 L. Ed. 1307, 62 S. Ct. 989.

"That word too ('commuter') has limitations unless it also is made a tool for rewriting the Act. . . . Administrative construction should have some bounds. It exceeds what are legitimate when it reconstructs the statute to nullify or contradict the plain meaning of nontechnical terms not artfully employed." (Mr. Justice Rutledge dissenting in Commissioner of Internal Revenue v. Flowers (1946) 326 U. S. 465, 90 L. Ed. 203, 66 S. Ct. 250.)

Interstate Commerce Commission. United States v. City and County of San Francisco (1940) 310 U. S. 16, 84 L. Ed. 1050, 60 S. Ct. 749, rehearing den. 310 U. S. 657, 84 L. Ed. 1420, 60 S. Ct. 1071. See Barrett Line, Inc. v. United States (1945) 326 U. S. 179, 89 L. Ed. 2128, 65 S. Ct. 1504.

Price Administrator. An administrative regulation may not be used to amend the plain terms of a statute under the guise of interpreting it. R. E. Schanzer Inc. v. Bowles (Em. App., 1944) 141 F. (2d) 262.

Railroad Retirement Board. Ellers v. Latimer (D. C. N. Y., 1942) 44 F. Supp. 822.

Where the statute, 45 USC 228 provides that judicial review may be had in "the district court of any district wherein the Board may have established an office," a regulation to the effect that the only "office" of the Board is the one in Washington, so that field offices are not to be included, is invalid. To give it effect would amend the statute. Ellers v. Latimer (D. C. N. Y., 1942) 44 F. Supp. 822.

p. 476, n. 25. **Interstate Commerce Commission v. Railway Labor Executives Ass'n** (1942) 315 U. S. 373, 86 L. Ed. 904, 62 S. Ct. 717.

p. 477, n. 26. **Administrator of Wage and Hour Division.** Walling v. L. Wiemann Co. (C. C. A. 7th, 1943) 138 F. (2d) 602, cert. den. 321 U. S. 785, 88 L. Ed. 1077, 64 S. Ct. 782; Clark v. Jacksonville Compress Co. (D. C. Tex., 1941) 45 F. Supp. 43.

Commissioner of Internal Revenue. Commissioner of Internal Revenue v. Wilcox (1946) 327 U. S. 404, 90 L. Ed. 752, 66 S. Ct. 546; Bingham's Trust v. Commissioner of Internal Revenue (1945) 325 U. S. 365, 89 L. Ed. 1670, 65 S. Ct. 1232; Helvering v. Credit Alliance Corp. (1942) 316 U. S. 107, 86 L. Ed. 1307, 62 S. Ct. 989.

National Labor Relations Board. Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of America (1945) 325 U. S. 161, 897, 89 L. Ed. 1534, 2007, 65 S. Ct. 1063, 1550. Note the dissent of Mr. Justice Jackson.

Secretary of the Treasury. See Barr v. United States (1945) 324 U. S. 83, 89 L. Ed. 765, 65 S. Ct. 522.

Social Security Board. *Social Security Board v. Nierotko (1946) 327 U. S. 358, 90 L. Ed. 718, 66 S. Ct. 637.

p. 477, n. 28. **Neuberger v. Commissioner of Internal Revenue** (1940) 311 U. S. 83, 85 L. Ed. 58, 61 S. Ct. 97.

p. 477, n. 29. **Wade v. Helvering** (1940) 73 App. D. C. 96, 117 F. (2d) 21. See Commissioner of Internal Revenue v. Wilcox (1946) 327 U. S. 404, 90 L. Ed. 752, 66 S. Ct. 546. See § 483.

§ 479. Second Rule: Settled Administrative Construction of Ambiguous Statute Is of Persuasive Force.

With respect to the weight of an administrative construction of a statute when not set forth by a settled regulation, rule or practice, but simply by the decision of the agency, see § 425C.

An administrative construction which is not made in an adversary proceeding is not entitled to the weight accorded to interpretations by administrative agencies entrusted with the responsibility of making *inter partes* decisions. *Fishgold v. Sullivan Drydock & Repair Corp. (1946) 328 U. S. 275, 90 L. Ed. 1230, 66 S. Ct. 1105.

p. 477, n. 30. **Cross-reference.** The same rule is in effect applied to administrative construction of administrative writings. See § 443.

Introductory. The second rule stated in the original work has now been broadened into a general rule that any administrative decision of a judicial question may be entitled to weight or to great weight by the reviewing court. Accordingly, to be entitled to weight an administrative construction need only be clearly established as such, and apparently need no longer be settled. See § 425C.

Administrative Procedure Act. Under the Administrative Procedure Act, Sec. 10(e), "So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action."

Administrator of Veterans' Affairs. *United States v. Citizens Loan & Trust Co.* (1942) 316 U. S. 209, 86 L. Ed. 1387, 62 S. Ct. 1026.

Administrator of Wage and Hour Division. *Boutell v. Walling* (1946) 327 U. S. 463, 90 L. Ed. 786, 66 S. Ct. 631; *Mabee v. White Plains Pub. Co., Inc.* (1946) 327 U. S. 178, 90 L. Ed. 607, 66 S. Ct. 511; *Roland Electrical Co. v. Walling* (1946) 326 U. S. 657, 90 L. Ed. 383, 66 S. Ct. 413; *Skidmore v. Swift & Co.* (1944) 323 U. S. 134, 89 L. Ed. 124, 65 S. Ct. 161; *United States v. American Trucking Ass'ns, Inc.* (1940) 310 U. S. 534, 84 L. Ed. 1345, 60 S. Ct. 1059, rehearing den. 311 U. S. 724, 65 L. Ed. 472, 61 S. Ct. 53; *Walling v. Reid* (C. C. A. 8th, 1943) 139 F. (2d) 323; *Phillips v. Meeker Co-operative Light & Power Ass'n* (D. C. D. Minn., 1945) 63 F. Supp. 733. See *Walling v. Fred Wolfman, Inc.* (D. C. W. D. Mo. W. D., 1944) 54 F. Supp. 917.

The weight accorded a ruling, interpretation or opinion of the administrative agency in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control. *Skidmore v. Swift & Co.* (1944) 323 U. S. 134, 89 L. Ed. 124, 65 S. Ct. 161.

Interpretative bulletins, a form of administrative construction, do not have the same binding force as legislative regulations issued pursuant to explicit statutory authority, but are entitled to great weight. *Overnight Motor Transportation Co. v. Missel* (1942) 316 U. S. 572, 86 L. Ed. 1682, 62 S. Ct. 1216; *Walling v. Peavy-Wilson Lumber Co.* (D. C. W. D. La., Shreveport Div., 1943) 49 F. Supp. 846. See § 489.

The contemporaneous construction of those charged with the administration of a new law is entitled to great respect. *Bumpus v. Continental Baking Co.* (C. C. A. 6th, 1941) 124 F. (2d) 549, cert. den. 316 U. S. 704, 86 L. Ed. 1772, 62 S. Ct. 1305.

Alien Cases. *United States v. Scheurer* (D. C. D. Ore., 1944) 55 F. Supp. 243.

Commissioner of Internal Revenue. *Commissioner of Internal Revenue v. Holmes' Estate* (1946) 326 U. S. 480, 90 L. Ed. 228, 66 S. Ct. 257; *Glass City Bank v. United States* (1945) 326 U. S. 265, 90 L. Ed. 56, 66 S. Ct. 108. *Better Business Bureau of Washington, D. C., Inc. v. United States* (1945) 326 U. S. 279, 90 L. Ed. 67, 66 S. Ct. 112; *Colgate-Palmolive-Peet Co. v. United States*, 320 U. S. 422, 88 L. Ed. 143, 64 S. Ct. 227 (1943); *Magruder v. Washington, Baltimore & Annapolis Realty Corp.* (1942) 316 U. S. 69, 86 L. Ed. 1278, 62 S. Ct. 922; *Busey v. Deshler Hotel Co.* (C. C. A. 6th, 1942) 130 F. (2d) 187; *United Fruit Co. v. Hassett* (D. C. D. Mass., 1945) 61 F. Supp. 1013. See *Commissioner of Internal Revenue v. Disston* (1945) 325 U. S. 442, 89 L. Ed. 1720, 65 S. Ct. 1328; *Commissioner of Internal Revenue v. Wemyss* (1945) 324 U. S. 303, 89 L. Ed. 958, 65 S. Ct. 652 and *McDonald v. Commissioner of Internal Revenue* (1944) 323 U. S. 57, 89 L. Ed. 68, 65 S. Ct. 96.

"The first administrative interpretation of a provision as it appears in a new act often expresses the general understanding of the times or the actual understanding of those who played an important part when the statute was drafted." (Judge Arant in *Augustus v. Commissioner of Internal Revenue* (C. C. A. 6th, 1941) 118 F. (2d) 38, cert. den. 313 U. S. 585, 85 L. Ed. 1540, 61 S. Ct. 1095.)

The persuasive value of an administrative construction may lie either (1) in contemporaneous expressions of opinion of men who probably were active in drafting the statute, or (2) its long standing character. *Seattle-First Nat. Bank v. United States* (D. C. Wash., 1942) 44 F. Supp. 603.

Director of Selective Service. *Billings v. Truesdell* (1944) 321 U. S. 542, 88 L. Ed. 917, 64 S. Ct. 737; *Tipper v. Northern Pacific Ry. Co.* (D. C. W. D. Wash., 1945) 62 F. Supp. 853.

Federal Alcohol Administration. See *Levers v. Anderson* (1945) 326 U. S. 219, 90 L. Ed. 26, 66 S. Ct. 72.

Interstate Commerce Commission. *Noble v. United States* (1943) 319 U. S. 88, 87 L. Ed. 1277, 63 S. Ct. 950; *New York, C. & St. L. R. Co. v. Frank* (1941) 314 U. S. 360, 86 L. Ed. 277, 62 S. Ct. 258; *United States v. American Trucking Ass'n, Inc.* (1940) 310 U. S. 534, 84 L. Ed. 1345, 60 S. Ct. 1059, rehearing den. 311 U. S. 724, 85 L. Ed. 472, 61 S. Ct. 53; *United States v. Baltimore & O. R. Co.* (C. C. A. 4th, 1943) 133 F. (2d) 831; *Doyle Transfer Co., Inc. of Glasgow, Ky. v. United States* (D. C. Col., 1942) 45 F. Supp. 691.

Judge Advocate General of the Army. *Adams v. United States* (1943) 319 U. S. 312, 87 L. Ed. 1421, 63 S. Ct. 1122.

Price Administrator. *Bowles v. Wheeler* (C. C. A. 9th, 1945) 152 F. (2d) 34, cert. den. 326 U. S. 775, 90 L. Ed. 468, 66 S. Ct. 265; *F. Uri & Co. v. Bowles* (C. C. A. 9th, 1945) 152 F. (2d) 713; *Bowles v. Inland Empire Dairy Ass'n* (D. C. E. D. Wash., N. D., 1943) 53 F. Supp. 210.

Railroad Retirement Board. See *Railroad Retirement Board v. Bates* (App. D. C., 1942) 126 F. (2d) 642.

Secretary of Agriculture. *Adams v. United States* (1943) 319 U. S. 312, 87 L. Ed. 1421, 63 S. Ct. 1122; *Queensboro Farms Products, Inc. v. Wickard* (C. C. A. 2d, 1943) 137 F. (2d) 969.

Secretary of the Interior. *Great Northern Ry. Co. v. United States* (1942) 315 U. S. 262, 86 L. Ed. 836, 62 S. Ct. 529; *Bailey v. Holland* (C. C. A. 4th, 1942) 126 F. (2d) 317; *United States v. Big Broad Transit Co.* (D. C. E. D. Wash., N. D., 1941) 42 F. Supp. 459.

The weight to be accorded an administrative construction is not dependent on strict contemporaneity in the construction. *Great Northern Ry. Co. v. United States* (1942) 315 U. S. 262, 86 L. Ed. 836, 62 S. Ct. 529.

Secretary of State. See *Hammond v. Hull* (App. D. C., 1942) 131 F. (2d) 23, cert. den. 318 U. S. 777, 87 L. Ed. 1145, 63 S. Ct. 830.

Secretary of the Treasury. *Jones v. Gaylord Guernsey Farms* (C. C. A. 10th, 1942) 128 F. (2d) 1008.

Securities and Exchange Commission. *Charles Hughes & Co. v. Securities & Exchange Commission* (C. C. A. 2d, 1943) 139 F. (2d) 434, cert. den. 321 U. S. 786, 88 L. Ed. 1077, 64 S. Ct. 781. See *American Power & Light Co. v. Securities & Exchange Commission* (1945) 325 U. S. 385, 89 L. Ed. 1683, 65 S. Ct. 1254.

Social Security Board. * *Social Security Board v. Nierotko* (1946) 327 U. S. 358, 90 L. Ed. 718, 66 S. Ct. 637; *United States v. Lalone* (C. C. A. 9th, 1945) 152 F. (2d) 43; *Kandelin v. Social Security Board* (C. C. A. 2d, 1943) 136 F. (2d) 327; *Morgan v. Social Security Board* (D. C. Pa., 1942) 45 F. Supp. 349.

State Agencies. *Ford Motor Co. v. Department of Treasury of State of Indiana* (1945) 323 U. S. 459, 89 L. Ed. 389, 65 S. Ct. 347; *Great Northern Ins. Co. v. Read* (1944) 322 U. S. 47, 88 L. Ed. 1121, 64 S. Ct. 873; *Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Sheppard* (C. C. A. 5th, 1941) 123 F. (2d) 773, cert. den. 316 U. S. 704, 86 L. Ed. 1772, 62 S. Ct. 1309.

Tennessee Valley Authority. *Tennessee Valley Authority v. Kinzer* (C. C. A. 6th, 1944) 142 F. (2d) 833.

War Food Administrator. *Bailey Farm Dairy Co. v. Jones* (D. C. E. D. Mo., 1945) 61 F. Supp. 209.

Law Review Note. See note (1942) 56 Harv. L. Rev. 100.

p. 478, n. 31. *Vives v. Serralles* (C. C. A. 1st, 1944) 145 F. (2d) 552; *Walling v. Reid* (C. C. A. 8th, 1943) 139 F. (2d) 323; *Tucker v. Hitchcock* (S. C. Fla., 1942) 44 F. Supp. 874.

See the cases cited in note 30 and § 425 et seq.

§ 480. — Additional Weight Where Affirmative Indications of Legislative Approval.

p. 479, n. 33. **Administrator of the Wage and Hour Division.** See *United States v. American Trucking Ass'ns, Inc.* (1940) 310 U. S. 534, 84 L. Ed. 1345, 60 S. Ct. 1059; rehearing den. 311 U. S. 724, 85 L. Ed. 472, 61 S. Ct. 53.

Commissioner of Internal Revenue. *Heininger v. Commissioner of Internal Revenue* (C. C. A. 7th, 1943) 133 F. (2d) 567, aff'd 320 U. S. 467, 88 L. Ed. 171, 64 S. Ct. 249.

Interstate Commerce Commission. See *Interstate Commerce Commission v. Parker* (1945) 326 U. S. 60, 89 L. Ed. 2051, 65 S. Ct. 1490 and *United States v. American Trucking Ass'ns, Inc.* (1940) 310 U. S. 534, 84 L. Ed. 1345, 60 S. Ct. 1059, rehearing den. 311 U. S. 724, 85 L. Ed. 472, 61 S. Ct. 53.

Secretary of the Interior. *Brooks v. Dewar* (1941) 313 U. S. 354, 85 L. Ed. 1399, 61 S. Ct. 979.

Tennessee Valley Authority. *Tennessee Valley Authority v. Kinzer* (C. C. A. 6th, 1944) 142 F. (2d) 833.

p. 479, n. 34. *Brooks v. Dewar* (1941) 313 U. S. 354, 85 L. Ed. 1399, 61 S. Ct. 979; *Tennessee Valley Authority v. Kinzer* (C. C. A. 6th, 1944) 142 F. (2d) 833.

p. 480, n. 36. **Commissioner of Internal Revenue.** *Douglas v. Commissioner of Internal Revenue* (1944) 322 U. S. 275, 88 L. Ed. 1271, 64 S. Ct. 988; *Commissioner of Internal Revenue v. Aluminum Co. of America* (C. C. A. 3rd, 1944) 142 F. (2d) 663, cert. den. 323 U. S. 728, 89 L. Ed. 585, 65 S. Ct. 64; *Heininger v. Commissioner of Internal Revenue* (C. C. A. 7th, 1943) 133 F. (2d) 567, aff'd 320 U. S. 467, 88 L. Ed. 171, 64 S. Ct. 249; *Commissioner of Internal Revenue v. Sun Pipe Line Co.* (C. C. A. 3rd, 1942) 126 F. (2d) 888; *Spokane Dry Goods Co. v. Commissioner of Internal Revenue* (C. C. A. 9th, 1942) 125 F. (2d) 865.

It has been held that four years is not long enough to give rise to a presumption that Congress was aware of a regulation and that its failure to amend the Act indicated approval of the interpretation. *Commissioner of Internal Revenue v. Sun Pipe Line Co.* (C. C. A. 3rd, 1942) 126 F. (2d) 888.

Federal Trade Commission. *Federal Trade Commission v. Bunte Brothers, Inc.* (1941) 312 U. S. 349, 85 L. Ed. 881, 61 S. Ct. 580.

Price Administrator. *Safeway Stores v. Bowles* (Em. App., 1944) 145 F. (2d) 836, cert. den. 324 U. S. 847, 89 L. Ed. 1408, 65 S. Ct. 683.

§ 481. — Administrative Construction Must Be Settled and Receive Acquiescence.

For an illustration of an administrative construction which has been approved repeatedly by the courts, see *Commissioner of Internal Revenue v. Disston* (1945) 325 U. S. 442, 89 L. Ed. 1720, 65 S. Ct. 1328.

p. 480, n. 37. **In General.** The rule set forth in this section, requiring acquiescence or that the administrative construction be settled in order to be entitled to weight, has apparently now been broadened into a rule that any administrative decision of a judicial question may be entitled to weight or to great weight by the reviewing court. See § 425C.

Administrator of Wage and Hour Division. *Walling v. Swift & Co.* (C. C. A. 7th, 1942) 131 F. (2d) 249.

Collector of Customs. *United States v. Myers* (1944) 320 U. S. 561, 88 L. Ed. 312, 64 S. Ct. 337.

Commissioner of Internal Revenue. *Maguire v. Commissioner of Internal Revenue* (1941) 313 U. S. 1, 85 L. Ed. 1149, 61 S. Ct. 789, rehearing den. 313 U. S. 598, 85 L. Ed. 1551, 61 S. Ct. 936; *Higgins v. Commissioner of Internal Revenue* (1941) 312 U. S. 212, 85 L. Ed. 397, 61 S. Ct. 475, rehearing den. 312 U. S. 714, 85 L. Ed. 1145, 61 S. Ct. 728; *Commissioner of Internal Revenue v. Sun Pipe Line Co.* (C. C. A. 3rd, 1942) 126 F. (2d) 888.

An administrative construction is no longer required to be well settled in order to be accorded great weight by the courts. See §§ 425C and 479. Thus the second rule has been applied even where the administrative construction has been promptly challenged by parties affected. *Colgate-Palmolive-Peet Co. v. United States*, 320 U. S. 422, 88 L. Ed. 143, 64 S. Ct. 227 (1943).

Federal Power Commission. *Niagara Falls Power Co. v. Federal Power Commission* (C. C. A. 2d, 1943) 137 F. (2d) 787, cert. den. 320 U. S. 792, 88 L. Ed. 477, 64 S. Ct. 206.

Interstate Commerce Commission. *Interstate Commerce Commission v. Railway Labor Executives Ass'n* (1942) 315 U. S. 373, 86 L. Ed. 904, 62 S. Ct. 717.

Price Administrator. *Davies Warehouse Co. v. Bowles* (1944) 321 U. S. 144, 88 L. Ed. 635, 64 S. Ct. 474.

Railroad Retirement Board. *Railroad Retirement Board v. Bates* (App. D. C., 1942) 126 F. (2d) 642.

Secretary of the Interior. *California v. Deseret Water, Oil & Irrigation Co.* (1917) 243 U. S. 415, 61 L. Ed. 821, 37 S. Ct. 394.

p. 480, n. 38. In General. Acquiescence in an administrative construction by parties affected is apparently no longer necessary for the construction to be accorded weight or great weight by the reviewing court. See §§ 425C and 479.

Administrator of Wage and Hour Division. *Walling v. Swift & Co.* (C. C. A. 7th, 1942) 131 F. (2d) 249; *Walling v. Fred Wolfertman, Inc.* (D. C. W. D. Mo., W. D., 1944) 54 F. Supp. 917.

Commissioner of Internal Revenue. The acquiescence of the Commissioner of Internal Revenue in a Tax Court ruling affecting a regulation, followed by action inconsistent with the withdrawal of the regulation, is not sufficiently definite administrative practice to provide a basis for a judicial ruling against the regulation on the strength of the acquiescence. *Douglas v. Commissioner of Internal Revenue* (1944) 322 U. S. 275, 88 L. Ed. 1271, 64 S. Ct. 988.

Price Administrator. *Davies Warehouse Co. v. Bowles* (1944) 321 U. S. 144, 88 L. Ed. 635, 64 S. Ct. 474.

p. 480, n. 41a. *Bowles v. Inland Empire Dairy Ass'n* (D. C. E. D. Wash., N. D., 1943) 53 F. Supp. 210.

§ 482. —Reasons for Rule.

A fourth reason for the second rule exists where the administrative construction appears to reflect the general understanding of the times in which the Act was drafted, and the opinions of its draftsmen. *Better Business Bureau of Washington, D. C., Inc. v. United States* (1945) 326 U. S. 279, 90 L. Ed. 67, 66 S. Ct. 112. See the cases cited in § 479, note 30.

p. 481, n. 46. *California v. Deseret Water, Oil & Irrigation Co.* (1917) 243 U. S. 415, 61 L. Ed. 821, 37 S. Ct. 394.

p. 482, n. 48. *Helvering v. Reynolds* (1941) 313 U. S. 528, 85 L. Ed. 1438, 61 S. Ct. 971, 134 A. L. R. 1155.

p. 482, n. 50. *Durkee Famous Foods, Inc. v. Harrison* (D. C. Ill., 1942) 46 F. Supp. 642; *First Trust Co. of St. Paul v. Reynolds* (D. C. Minn., 1942) 46 F. Supp. 497.

§ 483. Third Rule: Settled Construction of Ambiguous Statute Re-enacted Without Material Change Presumed to Be Ratified by Congress.

However, the third rule does not apply and reenactment cannot be held to ratify an administrative construction which is erroneous, inconsistent with or out of harmony with the statute. *Oberwinder v. Commissioner of Internal Revenue* (C. C. A. 8th, 1945) 147 F.

(2d) 255; *Brotherhood of Locomotive Firemen & Enginemen v. Interstate Commerce Commission* (App. D. C., 1945) 147 F. (2d) 312, cert. den. 325 U. S. 860, 89 L. Ed. 1981, 65 S. Ct. 1196; *Walling v. Baltimore Steam Packet Co.* (C. C. A. 4th, 1944) 144 F. (2d) 130. See § 478, note 29.

If the administrative regulation is contrary to the terms of the statute, reenactment of the statute annuls the regulation. *F. H. E. Oil Co. v. Commissioner of Internal Revenue* (C. C. A. 5th, 1945) 147 F. (2d) 1002.

Before the enactment of the National Labor Relations Act, it had been the settled practice of the administrative agencies dealing with labor relations to treat the signing of a written contract embodying a wage and hour agreement as the final step in the bargaining process. Congress, in enacting the National Labor Relations Act, had before it the record of this experience, and must be considered, in thus incorporating in the new legislation the collective bargaining requirement of the earlier statutes, to have included as a part of it the signed agreement long recognized under the earlier acts as the final step in the bargaining process. *H. J. Heinz Co. v. National Labor Relations Board* (1941) 311 U. S. 514, 85 L. Ed. 309, 61 S. Ct. 320.

The reenactment rule has been applied where Congress repeated the language of the Act in dealing with related subject matter. *Great Northern Ry. Co. v. United States* (1942) 315 U. S. 262, 86 L. Ed. 836, 62 S. Ct. 529.

p. 482, n. 51. *Commissioner of Internal Revenue. Boehm v. Commissioner of Internal Revenue* (1945) 326 U. S. 287, 90 L. Ed. 78, 66 S. Ct. 120; *Commissioner of Internal Revenue v. Wheeler* (1945) 324 U. S. 542, 89 L. Ed. 1166, 65 S. Ct. 799; *Fondren v. Commissioner of Internal Revenue* (1945) 324 U. S. 18, 89 L. Ed. 668, 65 S. Ct. 499; *United States v. Seattle-First Nat. Bank* (1944) 321 U. S. 583, 88 L. Ed. 944, 64 S. Ct. 713; *Rogan v. Commercial Discount Co.* (C. C. A. 9th, 1945) 149 F. (2d) 585, cert. den. 326 U. S. 764, 90 L. Ed. 460, 66 S. Ct. 145; *Winter Realty & Construction Co. v. Commissioner of Internal Revenue* (C. C. A. 2d, 1945) 149 F. (2d) 567, cert. den. 326 U. S. 754, 90 L. Ed. 452, 66 S. Ct. 92; *Keiferdorf v. Commissioner of Internal Revenue* (C. C. A. 9th, 1944) 142 F. (2d) 723, cert. den. 323 U. S. 733, 89 L. Ed. 588, 65 S. Ct. 69; *Jones Estate v. Commissioner of Internal Revenue* (C. C. A. 5th, 1942) 127 F. (2d) 231; *Aluminum Co. of America v. United States* (C. C. A. 3rd, 1941) 123 F. (2d) 615; *Commissioner of Internal Revenue v. West Production Co.* (C. C. A. 5th, 1941) 121 F. (2d) 9, cert. den. 314 U. S. 682, 86 L. Ed. 546, 62 S. Ct. 186; *Dodge Brothers, Inc. v. United States* (C. C. A. 4th, 1941) 118 F. (2d) 95; *Augustus v. Commissioner of Internal Revenue* (C. C. A. 6th, 1941) 118 F. (2d) 38, cert. den. 313 U. S. 585, 85 L. Ed. 1540, 61 S. Ct. 1095; *Commissioner of Internal Revenue v. Laguna Land & Water Co.* (C. C. A. 9th, 1941) 118 F. (2d) 112; *Wade v. Helvering* (1940) 73 App. D. C. 96, 117 F. (2d) 21; *State Street Trust Co. v. Hassett* (D. C. Mass., 1942) 45 F. Supp. 671; *Investment Corporation of Philadelphia v. United States* (D. C. E. D. Penn., 1941) 43 F. Supp. 64. See *United Fruit Co. v. Hassett* (D. C. D. Mass., 1945) 61 F. Supp. 1013. But see *Helvering v. Reynolds* (1941) 313 U. S. 428, 85 L. Ed. 1438, 61 S. Ct. 971, 134 A. L. R. 1155.

The court should be permitted "to ascertain whether there is a factual basis on which it can be concluded that the Congress intended to reenact the Regulation when it reenacted the statute." (*Judge Schwellenbach in Seattle—First Nat. Bank v. United States* (S. C. Wash., 1942) 44 F. Supp. 603.

The reenactment rule was not applied where the regulation was in effect only five months before the statute was reenacted. *Commissioner of Internal Revenue v. Sun Pipe Line Co.* (C. C. A. 3rd, 1942) 126 F. (2d) 888.

Price Administrator. *Bowles v. Wheeler* (C. C. A. 9th, 1945) 152 F. (2d) 34, cert. den. 326 U. S. 775, 90 L. Ed. 468, 66 S. Ct. 265; *Perkins v. Brown* (D. C. S. D. Ga., Savannah Div., 1943) 53 F. Supp. 176.

Secretary of Agriculture. *Queensboro Farms Products, Inc. v. Wickard* (C. C. A. 2d, 1943) 137 F. (2d) 969.

Bald reenactment of a statutory provision, without more, need not be given much weight as indicating an adoption of preceding administrative interpretation. But where careful consideration has been given by Congress in connection with a reenactment, much is to be said for a contention that Congress intended to adopt the intervening administrative interpretation. *Queensboro Farm Products, Inc. v. Wickard* (C. C. A. 2d, 1943) 137 F. (2d) 969.

Secretary of War. *Stout v. Hancock* (C. C. A. 4th, 1944) 146 F. (2d) 741, cert. den. 325 U. S. 850, 89 L. Ed. 1971, 65 S. Ct. 1086.

Law Review Articles. See Robert C. Brown, "Regulations, Reenactment, and the Revenue Acts" (1941) 54 Harv. L. Rev. 377; A. H. Feller, "Addendum to the Regulations Problem" (1941) 54 Harv. L. Rev. 1311, and E. N. Griswold, "Post-scriptum" (1941) 54 Harv. L. Rev. 1323.

p. 483, n. 53. *Commissioner of Internal Revenue v. Flowers* (1946) 326 U. S. 465, 90 L. Ed. 203, 66 S. Ct. 250; *Apartment Operators' Ass'n v. Commissioner of Internal Revenue* (C. C. A. 9th, 1943) 136 F. (2d) 435. See also § 492.

p. 483, n. 55. *Merchants Nat. Bank v. Commissioner of Internal Revenue*, 320 U. S. 256, 88 L. Ed. 35, 64 S. Ct. 108 (1943).

§ 485. — Conditions Must Be Similar Upon Reenactment.

p. 484, n. 63. *Brotherhood of Locomotive Firemen & Enginemen v. Interstate Commerce Commission* (App. D. C., 1945) 147 F. (2d) 312, cert. den. 325 U. S. 860, 89 L. Ed. 1981, 65 S. Ct. 1196.

§ 486. — Administrative Construction Must Be Settled Prior to Reenactment.

Where a statute has received inconsistent constructions from two different agencies, both concerned with its enforcement, reenactment cannot be considered a ratification of either construction. *Fishgold v. Sullivan Drydock & Repair Corp.* (1946) 328 U. S. 275, 90 L. Ed. 1230, 66 S. Ct. 1105.

p. 485, n. 64. *Seattle-First Nat. Bank v. United States* (D. C. Wash., 1942) 44 F. Supp. 603.

§ 488. Change in Administrative Construction.

An administrative construction made in a regulation which creates a certain status among persons affected can only be altered by another regulation. Attempts to change the construction by interpretative statements of less formality than a regulation are ineffective. *F. Uri & Co. v. Bowles* (C. C. A. 9th, 1945) 152 F. (2d) 713.

p. 485, n. 67. *Investment Corporation of Philadelphia v. United States* (D. C. E. D. Penn., 1941) 43 F. Supp. 64.

p. 485, n. 68. *Commissioner of Internal Revenue. American Chicle Co. v. United States* (1942) 316 U. S. 450, 86 L. Ed. 1591, 62 S. Ct. 1144; *Helvering v. Reynolds* (1941) 313 U. S. 428, 85 L. Ed. 1438, 61 S. Ct. 971, 134 A. L. R. 1155; *Helvering v. Edison Bros.* (C. C. A. 8th, 1943) 133 F. (2d) 575, cert. den. 319 U. S. 752, 87 L. Ed. 1706, 63 S. Ct. 1166; *Commissioner of Internal Revenue v. Air Reduction Co.* (C. C. A. 2d, 1942) 130 F. (2d) 145, cert. den. 317 U. S. 681, 87 L. Ed. 546, 63 S. Ct. 201; *Busey v. Deshler Hotel Co.* (C. C. A. 6th, 1942) 130 F. (2d) 187; *Allen v. National Manufacture & Stores Corp.* (C. C. A. 5th, 1942) 125 F. (2d) 239, cert. den. 316 U. S. 679, 86 L. Ed. 1753, 62 S. Ct. 1106; *Investment Corporation of Philadelphia v. United States* (D. C. E. D. Penn., 1941) 43 F. Supp. 64.

Secretary of the Interior. An agency has been held not estopped by an administrative construction which was impelled by what is regarded as inaccurate statements in a previous Supreme Court decision. *Great Northern Ry. Co. v. United States* (1942) 315 U. S. 262, 86 L. Ed. 836, 62 S. Ct. 529. See § 252A. Nor can the United States be estopped by a previous contrary administrative construction, especially where private rights are involved. *United States v. Santa Fe Pac. R. Co.* (1941) 314 U. S. 339, 86 L. Ed. 260, 62 S. Ct. 248. See § 252A.

SUBDIVISION V

EXTENT AND SCOPE OF JUDICIAL REVIEW OF ADMINISTRATIVE RULES AND REGULATIONS

CHAPTER 29

IN GENERAL

§ 489. Introduction.

p. 487, note a. Legislative regulations are promulgated under specific prospective authority from Congress. *Seattle-First Nat. Bank v. United States* (D. C. Wash. 1942) 44 F. Supp. 603.

A regulation is "legislative" in character if it is promulgated pursuant to a standard laid down by Congress and constitutes a determination of a factual matter, usually in the abstract, for general application. On the other hand, a regulation is "interpretative" where it undertakes the construction of a statute or other decision of a judicial question.

The fundamental distinction between fact and law insofar as it concerns regulations, is illustrated as to questions of law in the sections on administrative construction. See § 475 et seq. It is illuminated to a lesser extent as to questions of fact by the few cases which deal with any degree of articulateness with legislative regulations. In *Addison v. Holly Hill Fruit Products* (1944) 322 U. S. 607, 88 L. Ed. 1488, 64 S. Ct. 1215, the Administrator of the Wage and Hour Division had been authorized under the Fair Labor Standards Act to define the phrase "area of production," and he had promulgated a regulation which provided that an individual is employed in an "area of production" if, among other things, the number of persons employed in the establishment "does not exceed seven." This legislative regulation, which was a determination of a factual matter, was held invalid as going beyond the plain geographic or factual implications of the phrase, and hence unauthorized by the Act.

An interesting type of legislative regulation is to be found in those issued by the Price Administrator under the Emergency Price Control Act of 1942, 50 USC App. 901 et seq., where the Administrator is authorized by the statute "to promulgate regulations fixing prices of commodities which in his judgment will be generally fair and equitable and will effectuate the purposes of this Act." *Yakus v. United States* (1944) 321 U. S. 414, 88 L. Ed. 834, 64 S. Ct. 660. The subject matter of regulations which fix "fair and equitable" prices is factual in nature and hence is a matter of essentially legislative character. *Yakus v. United States* (1944) 321 U. S. 414, 88 L. Ed. 834, 64 S. Ct. 660. See § 13. It is inherently different from an interpretative regulation construing a statutory provision which decides a question of law.

The regulations issued by the Price Administrator frequently consist of legislative regulations which may be joined, in the same document, with an interpretative regulation. The interpretative portion may even interpret the legislative part of the regulation. See *Bowles v. Seminole Rock and Sand Co.* (1945) 325 U. S. 410, 89 L. Ed. 1700, 65 S. Ct. 1215.

The differences between legislative and interpretative regulations are profound and pose the differences between the legislative and judicial spheres of government. See §§ 13, 425 et seq. They become important on judicial review where the issue is the finality of the agency's action. An interpretative regulation is ordinarily entitled only to great weight. See §§ 425C, 478 et seq. But a legislative regulation which is consistent with the statute and which is reasonable has the force of law. See §§ 13, 492, 499, 500; *Yakus v. United States* (1944) 321 U. S. 414, 88 L. Ed. 854, 64 S. Ct. 660; *Bowles v. Willingham* (1944) 321 U. S. 503, 88 L. Ed. 892, 64 S. Ct. 641.

Administrative Procedure Act. The definition of "Rule" in the Administrative Procedure Act, section 2 (c), includes agency statements designed to "interpret or describe law or policy," and hence includes both interpretative and legislative regulations.

p. 487, note b. *Textile Mills Securities Corp. v. Commissioner of Internal Revenue* (1941) 314 U. S. 326, 86 L. Ed. 249, 62 S. Ct. 272. See *Magruder v. Washington, Baltimore & Annapolis Realty Corp.* (1942) 316 U. S. 69, 86 L. Ed. 1278, 62 S. Ct. 922.

The words "ordinary and necessary" are not so clear and unambiguous in their meaning and application as to leave no room for an interpretative regulation. *Textile Mills Securities Corp. v. Commissioner of Internal Revenue* (1941) 314 U. S. 326, 86 L. Ed. 249, 62 S. Ct. 272.

Nor are the crucial words of a statute, "carrying on or doing business," so easy of application to varying facts that they leave no room for administrative interpretation or elucidation. Interpretative regulations are appropriate aids toward eliminating that confusion and uncertainty. *Magruder v. Washington, Baltimore & Annapolis Realty Corp.* (1942) 316 U. S. 69, 86 L. Ed. 1278, 62 S. Ct. 922.

Also, a general policy clearly recognized may be expressed by interpretative regulation. *Textile Mills Securities Corp. v. Commissioner of Internal Revenue* (1941) 314 U. S. 326, 86 L. Ed. 249, 62 S. Ct. 272.

Some agencies now issue "Interpretative Bulletins" which run to considerable length and provide an elaborate example of administrative interpretation. See *Roland Electrical Co. v. Walling* (1946) 326 U. S. 657, 90 L. Ed. 383, 66 S. Ct. 413.

p. 487, note d. Powers delegated to the Administrator of the Wage and Hour Division to define "executive" and "administrative" employees is a direction to that agency to make a finding of fact as to what characteristics of employment will identify administrative or executive officers. *Mantel v. Ralph Knight Inc.* (D. C. Mo., 1942) 45 F. Supp. 373. This points up the factual nature of legislative regulations and of the standards which they implement.

p. 487, note f. See *L. P. Steuart & Bro. v. Bowles* (1944) 322 U. S. 398, 88 L. Ed. 1350, 64 S. Ct. 1097.

p. 488, note k. But see *Helvering v. Credit Alliance Corp.* (1942) 316 U. S. 107, 86 L. Ed. 1307, 62 S. Ct. 989; *Magruder v. Washington, Baltimore & Annapolis Realty Corp.* (1942) 316 U. S. 69, 86 L. Ed. 1278, 62 S. Ct. 922; *Textile Mills Securities Corp. v. Commissioner of Internal Revenue* (1941) 314 U. S. 326, 86 L. Ed. 249, 62 S. Ct. 272; *Seattle v. First Nat. Bank v. United States* (D. C. Wash., 1942) 44 F. Supp. 603.

p. 488, note n. See § 495.

Administrative Procedure Act. The definition of "Rule" in the Administrative Procedure Act, Sec. 2 (c), includes an agency statement which "describes the organization, procedure, or practice requirements of any agency."

I. NATURE AND SCOPE OF ADMINISTRATIVE REGULATIONS

§ 490. In General.

The power to promulgate rules and regulations of a certain type is not the equivalent of a regulation of that type duly promulgated. For instance, the power to promulgate rules or regulations under

which a capital stock tax return might have been amended is not the equivalent of the promulgation of such rules and regulations. *Scaife Co. v. Commissioner of Internal Revenue* (1941) 314 U. S. 459, 86 L. Ed. 339, 62 S. Ct. 338.

p. 488, n. 2. *Angelus Milling Co. v. Commissioner of Internal Revenue* (1945) 325 U. S. 293, 89 L. Ed. 1619, 65 S. Ct. 1162; *Rogge v. United States* (C. C. A. 9th, 1942) 128 F. (2d) 800, cert. den. 317 U. S. 656, 87 L. Ed. 528, 63 S. Ct. 54; *L. P. Steuart & Bro. v. Bowles* (1944) 322 U. S. 398, 88 L. Ed. 1350, 64 S. Ct. 1097.

p. 489, n. 4. See *Stanger v. Vocafilm Corp.* (C. C. A. 2d, 1945) 151 F. (2d) 894.

p. 489, n. 5. *Angelus Milling Co. v. Commissioner of Internal Revenue* (1945) 325 U. S. 293, 89 L. Ed. 1619, 65 S. Ct. 1162; *Seattle-First Nat. Bank v. United States* (D. C. Wash., 1942) 44 F. Supp. 603. See *Addison v. Holly Hill Fruit Products* (1944) 322 U. S. 607, 88 L. Ed. 1488, 64 S. Ct. 1215.

p. 489, n. 8. "Undoubtedly regulations adopted in the exercise of the administrative rule making power, like laws enacted by legislatures, embody announcements of policy." (Mr. Chief Justice Stone in *Columbia Broadcasting System v. United States* (1942) 316 U. S. 407, 86 L. Ed. 1563, 62 S. Ct. 1194.)

p. 489, n. 9. *United States v. Eastman* (C. C. A. 9th, 1941) 118 F. (2d) 421. See *Addison v. Holly Hill Fruit Products* (1944) 322 U. S. 607, 88 L. Ed. 1488, 64 S. Ct. 1215.

"Unlike an administrative order or a court judgment adjudicating the rights of individuals, which is binding only on the parties to the particular proceeding, a valid exercise of the rule making power is addressed to and sets a standard of conduct for all to whom its terms apply. It operates as such in advance of the imposition of sanctions upon any particular individual." (Mr. Chief Justice Stone in *Columbia Broadcasting System v. United States* (1942) 316 U. S. 407, 418, 86 L. Ed. 1563, 62 S. Ct. 1194.)

§ 492. Valid Regulations Have Force of Statute.

Regulations and official interpretations are ordinarily binding on administrative agencies. See § 252A.

A party to administrative proceedings who brings himself within an adjustment provision of an administrative regulation is entitled to the relief offered by the provision. Denial of such relief is an arbitrary act of the agency and will be reversed on judicial review. *Armour & Co. of Delaware v. Brown* (Em. App., 1943) 137 F. (2d) 233. See also sec. 252A.

p. 490, n. 13. A valid legislative regulation has the force of law.

Administrator of Wage and Hour Division. *Stanger v. Vocafilm Corp.* (C. C. A. 2d, 1945) 151 F. (2d) 894; *Fanelli v. U. S. Gypsum Co.* (C. C. A. 2d, 1944) 141 F. (2d) 216; *Walling v. Cohen* (C. C. A. 3rd, 1944) 140 F. (2d) 453; *Pearson v. Walling* (C. C. A. 8th, 1943) 138 F. (2d) 655, cert. den. 321 U. S. 775, 88 L. Ed. 1069, 64 S. Ct. 616; *Bernick v. Coddon* (D. C. D. Minn., 1946) 65 F. Supp. 89.

Attorney General. *United States v. Potts* (D. C. M. D. Pa., 1944) 57 F. Supp. 204.

Commissioner of Internal Revenue. *New York Handkerchief Mfg. Co. v. United States* (C. C. A. 7th, 1944) 142 F. (2d) 111, cert. den. 323 U. S. 725, 89 L. Ed. 582, 65 S. Ct. 58. *Janbert Bros. v. United States* (C. C. A. 5th, 1944) 141 F. (2d) 206.

Federal Communications Commission. *Columbia Broadcasting System v. United States* (1942) 316 U. S. 409, 86 L. Ed. 1563, 62 S. Ct. 1194.

Federal Crop Insurance Corporation. *Felder v. Federal Crop Insurance Corp.* (C. C. A. 4th, 1944) 146 F. (2d) 638.

Interstate Commerce Commission. *Illinois Steel Co. v. Baltimore & O. R. Co.* (1944) 320 U. S. 508, 88 L. Ed. 259, 64 S. Ct. 322.

Rules of an administrative agency validly adopted in the exercise of its authority acquire the force of law. *Lilly v. Grand Trunk Western R. Co.* (1943) 317 U. S. 481, 87 L. Ed. 411, 63 S. Ct. 347.

Price Administrator. *Conklin Pen Co. v. Bowles* (Em. App., 1945) 152 F. (2d) 764; *Armour & Co. of Delaware v. Brown* (Em. App., 1943) 137 F. (2d) 233. See *L. P. Steuart & Bro. v. Bowles* (1944) 322 U. S. 398, 88 L. Ed. 1350, 64 S. Ct. 1097; *Yakus v. United States* (1944) 321 U. S. 414, 88 L. Ed. 834, 64 S. Ct. 660.

Railroad Retirement Board. *Bruno v. Railroad Retirement Board* (D. C. W. D. Pa., 1942) 47 F. Supp. 3.

Secretary of the Interior. *United States v. Big Bend Transit Co.* (D. C. E. D. Wash., N. D., 1941) 42 F. Supp. 459.

Secretary of War. *Billings v. Truesdell* (1944) 321 U. S. 542, 88 L. Ed. 917, 64 S. Ct. 737; *Standard Oil Co. of California v. Johnson* (1942) 316 U. S. 481, 86 L. Ed. 1611, 62 S. Ct. 1168.

Tennessee Valley Authority. *Tennessee Valley Authority v. Kinzer* (C. C. A. 6th, 1944) 142 F. (2d) 833.

§ 493. Regulations Generally Prospective in Operation.

Though it takes effect prospectively, a valid regulation may necessarily have an incidental retroactive effect also. Thus, regulations as to the labeling of whiskey sold in interstate commerce affect the manufacture of such whiskey; such regulations are not invalid although changes in the regulations made during the course of manufacture render the whiskey saleable only under labeling different from that for which the method of manufacture prepared it. *Speert v. Morgenthau* (1940) 73 App. D. C. 70, 116 F. (2d) 301.

p. 490, n. 16. *Federal Security Administrator v. Quaker Oats Co.* (1943) 318 U. S. 218, 87 L. Ed. 724, 63 S. Ct. 589.

p. 491, n. 18. *Commissioner of Internal Revenue v. Commodore Inc.* (C. C. A. 6th, 1943) 135 F. (2d) 89. See *Helvering v. Griffiths* (1943) 318 U. S. 371, 87 L. Ed. 843, 63 S. Ct. 636.

II. TYPES OF ADMINISTRATIVE REGULATIONS AND RULES

§ 494. Types of Administrative Regulations.

War rationing of oil available to retailers has also been made by legislative regulation, enforced by suspension order for violation. *L. P. Steuart & Bro. v. Bowles* (1944) 322 U. S. 398, 88 L. Ed. 1350, 64 S. Ct. 1097.

§ 494A. (Changed) Administrative Rulings; General Counsel's Memoranda.

While an administrative ruling is not binding on a court, it is persuasive to the extent of its reasonableness. *Lorenzetti v. American Trust Co.* (D. C. Cal., 1942) 45 F. Supp. 128.

Rulings by the Commissioner of Internal Revenue on isolated cases submitted to him do not commit the Department to any interpretation of the law. *Oberwinder v. Commissioner of Internal Revenue* (C. C. A. 8th, 1945) 147 F. (2d) 255. See also § 252A.

Opinions of the General Counsel for the Bureau of Internal Revenue are merely advisory and do not have the force of regulations. *Aluminum Co. of America v. United States* (C. C. A. 3rd, 1941) 123 F. (2d) 615.

The informal rulings of the Wage and Hour Administrator have been held to constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. *Skidmore v. Swift & Co.* (1944) 323 U. S. 134, 89 L. Ed. 124, 65 S. Ct. 161.

Certain rulings of officials in the Treasury Department are set forth in *Commissioner of Internal Revenue v. Flowers* (1946) 326 U. S. 465, 90 L. Ed. 203, 66 S. Ct. 250.

§ 495. (Changed) Administrative Rules and Procedural Regulations.

Whether a procedural rule of an administrative agency is authorized under the statute is also a judicial question. See § 454.

A suit for mandamus cannot be used to compel an agency to adopt certain rules of procedure. *Nolde & Horst v. Helvering* (App. D. C., 1941) 122 F. (2d) 41. See also § 688 et seq.

Where a procedural rule adopted is authorized under the statutory jurisdiction conferred upon the agency, any limitations on the scope of the proceeding contained therein will be controlling. *Vinson v. Washington Gas Light Co.* (1944) 321 U. S. 489, 88 L. Ed. 883, 64 S. Ct. 731. Thus a rule promulgated pursuant to statute by the Public Utilities Commission of the District of Columbia to the effect that the grant of a petition to intervene should neither change nor enlarge the issues in a proceeding before the Commission, was sustained even though the Emergency Price Control Act required thirty days' notice to and intervention as a matter of right by the Director of Economic Stabilization in any proceedings involving the increase of a public utility rate. *Vinson v. Washington Gas Light Co.* (1944) 321 U. S. 489, 88 L. Ed. 883, 64 S. Ct. 731.

A procedural regulation is valid where reasonable. *Shoong Inv. Co. v. Anglim* (D. C. Cal., 1942) 45 F. Supp. 711. See § 500.

While an agency, because it has power to change its rules, may be conceded to have power to waive them in a particular case, one member of it, though he constitute a division for the dispatch of business, cannot do so. *Commissioner of Internal Revenue v. Realty Operators, Inc.* (C. C. A. 5th, 1941) 118 F. (2d) 286.

p. 492, n. 24. Rules for the conduct of administrative proceedings may be established by "regulation" as well as by "rule." See *Levers v. Anderson* (1945) 326 U. S. 219, 90 L. Ed. 26, 66 S. Ct. 72 and *Angelus Milling Co. v. Commissioner of Internal Revenue* (1945) 325 U. S. 293, 89 L. Ed. 1619, 65 S. Ct. 1162.

p. 492, n. 26. See also § 282.

p. 493, n. 29. *National Labor Relations Board v. Pacific Gas & Electric Co.* (C. C. A. 9th, 1941) 118 F. (2d) 780.

§ 495A. (New) Regulations Prescribing Forms.

Administrative regulations prescribing forms for such things as tax returns, bills of lading, books of account, etc., made pursuant to statutory authority, are subject to the due process requirement of reasonableness. *Commissioner of Internal Revenue v. Lane-Wells Co.* (1944) 321 U. S. 219, 88 L. Ed. 684, 64 S. Ct. 511; *Illinois Steel*

Co. v. Baltimore & O. R. Co. (1944) 320 U. S. 508, 88 L. Ed. 259, 64 S. Ct. 322. See Bowles v. Glick Bros. Lumber Co. (C. C. A. 9th, 1945) 146 F. (2d) 566, cert. den. 325 U. S. 877, 89 L. Ed. 1994, 65 S. Ct. 1554.

See also §§ 16A and 500.

III. VALIDITY OF ADMINISTRATIVE REGULATIONS

§ 496. Judicial Review of Administrative Regulations.

The validity of an administrative regulation may be judicially determined in a case involving private rights where such rights depend upon the validity of the regulation. See *Addison v. Holly Hill Fruit Products* (1944) 322 U. S. 607, 88 L. Ed. 1488, 64 S. Ct. 1215.

p. 493, n. 35. See § 247A.

Interstate Commerce Commission. *United States v. Resler* (1941) 313 U. S. 57, 85 L. Ed. 1185, 61 S. Ct. 820.

State Agencies. See *Ex parte Cleio Hull* (1941) 312 U. S. 546, 85 L. Ed. 1034, 61 S. Ct. 640, rehearing den. 312 U. S. 716, 85 L. Ed. 1146, 61 S. Ct. 823.

War Food Administrator. See *Varney v. Warehime* (C. C. A. 6th, 1945) 147 F. (2d) 238, cert. den. 325 U. S. 882, 89 L. Ed. 1997, 65 S. Ct. 1575.

§ 497. No Substitution for Agency's Judgment.

p. 494, n. 36. See *Scaife Co. v. Commissioner of Internal Revenue* (1941) 314 U. S. 459, 86 L. Ed. 339, 62 S. Ct. 338.

p. 494, n. 37. *Administrator of Wage and Hour Division*. Where part of a regulation is invalid, the court will not substitute its judgment by carving out a new regulation judicially, but will withhold further proceedings until the agency has promulgated a new regulation. *Addison v. Holly Hill Fruit Products* (1944) 322 U. S. 607, 88 L. Ed. 1488, 64 S. Ct. 1215.

Commissioner of Internal Revenue. *City Bank Farmers Trust Co. v. Hoey* (C. C. A. 2d, 1942) 125 F. (2d) 577.

Federal Security Administrator. *Federal Security Administrator v. Quaker Oats Co.* (1943) 318 U. S. 218, 87 L. Ed. 724, 63 S. Ct. 589.

Price Administrator. *Safeway Stores v. Bowles* (Em. App., 1944) 145 F. (2d) 836, cert. den. 324 U. S. 847, 89 L. Ed. 1408, 65 S. Ct. 683.

Secretary of Interior. *United States v. Eastman* (C. C. A. 9th, 1941) 118 F. (2d) 421. See *Utah Power & Light Co. v. United States* (1917) 243 U. S. 389, 61 L. Ed. 791, 37 S. Ct. 387.

§ 498. Presumption of Validity.

The burden is upon those who attack an administrative regulation, when power to make regulations is given by Congress, to make its invalidity so manifest that the court has no choice except to hold the regulation inappropriate to the end specified in the statute. *Ralph Knight Inc. v. Mantel* (C. C. A. 8th, 1943) 135 F. (2d) 514.

p. 495, n. 40. See § 755.

Administrator of Wage and Hour Division. *Walling v. McCracken County Peach Growers Ass'n* (D. C. W. D. Ky., 1943) 50 F. Supp. 900.

Price Administrator. *Barnett v. Bowles* (Em. App., 1945) 151 F. (2d) 77; *Cudahy Bros. Co. v. Bowles* (Em. App., 1944) 142 F. (2d) 468; *Montgomery Ward v. Bowles* (Em. App., 1943) 138 F. (2d) 669.

Secretary of the Interior. *Rogge v. United States* (C. C. A. 9th, 1942) 128 F. (2d) 800, cert. den. 317 U. S. 656, 87 L. Ed. 528, 63 S. Ct. 54; *Bailey v. Holland* (C. C. A. 4th, 1942) 126 F. (2d) 137.

Social Security Board. *Safeway Stores v. Porter* (Em. App., 1946) 154 F. (2d) 656; *Morgan v. Social Security Board* (D. C. Pa., 1942) 45 F. Supp. 349.

p. 495, n. 41. Commissioner of Internal Revenue v. Swift & Co. Employees Benefit Ass'n (C. C. A. 7th, 1945) 151 F. (2d) 625. See Addison v. Holly Hill Fruit Products (1944) 322 U. S. 607, 88 L. Ed. 1488, 64 S. Ct. 1215.

§ 498A. (New) Where Regulations Conflict with Powers and Regulations of Another Agency.

Where the contention is made that the regulations of one federal agency having regulatory power over a utility conflict with the powers and regulations of another regulatory federal agency, the court will examine the statutes, orders and proceedings of both agencies and determine the question of power and authority. Northwestern Electric Co. v. Federal Power Commission (1944) 321 U. S. 119, 88 L. Ed. 596, 64 S. Ct. 451.

§ 499. First Rule of Validity: Regulation Must Be Consistent and in Harmony with Statute.

Where the statute leaves to the agency the drawing of a definitive line or point, and there is no mathematical or logical way of fixing it precisely, the decision of the agency must be accepted by the courts unless it is very wide of any reasonable mark. Addison v. Holly Hill Fruit Products (1944) 322 U. S. 607, 88 L. Ed. 1488, 64 S. Ct. 1215.

p. 495, n. 42. See also § 454.

Administrator of Wage and Hour Division. * Addison v. Holly Hill Fruit Products (1944) 322 U. S. 607, 88 L. Ed. 1488, 64 S. Ct. 1215; Sun Publishing Co. v. Walling (C. C. A. 6th, 1944) 140 F. (2d) 445, cert. den. 322 U. S. 728, 88 L. Ed. 1564, 64 S. Ct. 946; Ralph Knight Inc. v. Mantel (C. C. A. 8th, 1943) 135 F. (2d) 514; Walling v. McCracken County Peach Growers Ass'n (D. C. W. D. Ky., 1943) 50 F. Supp. 900; Mantel v. Ralph Knight Inc. (D. C. Mo. 1942) 45 F. Supp. 373; Clark v. Jacksonville Compress Co. (D. C. Tex., 1941) 45 F. Supp. 43.

A definition by the Administrator, pursuant to the Fair Labor Standards Act, of "area of production" so as to include an employee of a cannery "where the number of employees in such establishment does not exceed seven" was invalid as beyond the plain geographic implications of that phrase and hence unauthorized. Addison v. Holly Hill Fruit Products (1944) 322 U. S. 607, 88 L. Ed. 1488, 64 S. Ct. 1215.

Commissioner of Internal Revenue. Bingham's Trust v. Commissioner of Internal Revenue (1945) 325 U. S. 365, 89 L. Ed. 1670, 65 S. Ct. 1232; Helvering v. Sabine Transportation Co., Inc. (1943) 318 U. S. 306, 87 L. Ed. 773, 63 S. Ct. 569; Taft v. Helvering (1940) 311 U. S. 195, 85 L. Ed. 130, 61 S. Ct. 244; Commissioner of Internal Revenue v. Swift & Co. Employees Benefit Ass'n (C. C. A. 7th, 1945) 151 F. (2d) 625; Kaufman v. United States (C. C. A. 4th, 1942) 131 F. (2d) 854; Busey v. Deshler Hotel Co. (C. C. A. 6th, 1942) 130 F. (2d) 187; Lamont v. Commissioner of Internal Revenue (C. C. A. 8th, 1941) 120 F. (2d) 996; Commissioner of Internal Revenue v. Hughes Tool Co. (C. C. A. 5th, 1941) 118 F. (2d) 474; Hughes Tool Co. v. Commissioner of Internal Revenue (C. C. A. 5th, 1941) 118 F. (2d) 472; Augustus v. Commissioner of Internal Revenue (C. C. A. 6th, 1941) 118 F. (2d) 38, cert. den. 313 U. S. 585, 85 L. Ed. 1540, 61 S. Ct. 1095; First-Mechanics Nat. Bank of Trenton v. Commissioner of Internal Revenue (C. C. A. 3rd, 1940) 117 F. (2d) 127; Wade v. Helvering (1940) 73 App. D. C. 96, 117 F. (2d) 21. See Robinette v. Helvering (1943) 318 U. S. 184, 87 L. Ed. 700, 63 S. Ct. 540; Seattle-First Nat. Bank v. United States (D. C. Wash., 1942) 44 F. Supp. 603.

Secretary of the Interior. United States v. Moorehead (1917) 243 U. S. 607, 61 L. Ed. 926, 37 S. Ct. 458; Utah Power & Light Co. v. United States (1917) 243 U. S. 389, 61 L. Ed. 791, 37 S. Ct. 387.

Secretary of the Treasury. United States v. Dauphin Deposit Trust Co. (D. C. M. D. Pa., 1943) 50 F. Supp. 73.

Powers not conferred may not be exerted under the guise of exercising a lawful power. See §§ 566 and 425A et seq.

p. 496, n. 43. **Commissioner of Internal Revenue.** *Bingham's Trust v. Commissioner of Internal Revenue* (1945) 325 U. S. 365, 89 L. Ed. 1670, 65 S. Ct. 1232; *Taft v. Helvering* (1940) 311 U. S. 195, 85 L. Ed. 130, 61 S. Ct. 244; *Helvering v. Janney* (1940) 311 U. S. 189, 85 L. Ed. 118, 61 S. Ct. 241, 131 A. L. R. 930; *Commissioner of Internal Revenue v. Commodore, Inc.* (C. C. A. 6th, 1943) 135 F. (2d) 89; *Helvering v. Edison Bros.* (C. C. A. 8th, 1943) 133 F. (2d) 575, cert. den. 319 U. S. 752, 87 L. Ed. 1706, 63 S. Ct. 1166; *Busey v. Deshler Hotel Co.* (C. C. A. 6th, 1942) 130 F. (2d) 187; *Allis v. La Budde* (C. C. A. 7th, 1942) 128 F. (2d) 838.

Price Administrator. *United States v. Johnson* (D. C. D. Del., 1943) 53 F. Supp. 167.

p. 497, n. 46. See the other cases cited in this section and in § 454.

Commissioner of Internal Revenue. *Commissioner of Internal Revenue v. Laguna Land & Water Co.* (C. C. A. 9th, 1941) 118 F. (2d) 112.

Interstate Commerce Commission. *United States v. Resler* (1941) 313 U. S. 57, 85 L. Ed. 1185, 61 S. Ct. 820.

p. 497, n. 47. *United States v. Moorehead* (1917) 243 U. S. 607, 61 L. Ed. 926, 37 S. Ct. 458.

p. 497, n. 50. *Helvering v. Janney* (1940) 311 U. S. 189, 85 L. Ed. 118, 61 S. Ct. 241, 131 A. L. R. 930.

An administrative regulation may not be construed so as to violate the statute. *Commissioner of Internal Revenue v. Netcher* (C. C. A. 7th, 1944) 143 F. (2d) 484, cert. den. 323 U. S. 759, 89 L. Ed. 607, 65 S. Ct. 92.

p. 497, n. 51. See *United States v. Moorehead* (1917) 243 U. S. 607, 61 L. Ed. 926, 37 S. Ct. 458.

§ 500. Second Rule of Validity: Regulation Must Not Be Arbitrary or Unreasonable.

Whether a legislative regulation is reasonable will be decided upon the basis of the evidence taken in the judicial proceeding on the issue of reasonableness. The question is not controlled by what was proved or decided at the administrative hearing. *United States v. Lord-Mott Co.* (D. C. D. Md., 1944) 57 F. Supp. 128. See also § 262 et seq.

Regulations and administrative rules must not only accord with constitutional statutes, but must be themselves in accord with the Constitution. A regulation which denies a right guaranteed by the Constitution is invalid. *Ex parte Cleio Hull* (1941) 312 U. S. 546, 85 L. Ed. 1034, 61 S. Ct. 640, rehearing den. 312 U. S. 716, 85 L. Ed. 1146, 61 S. Ct. 823.

p. 497, n. 52. **Administrator of Wage and Hour Division.** *Stanger v. Vocafilm* (C. C. A. 2d, 1945) 151 F. (2d) 894; *Fanelli v. U. S. Gypsum Co.* (C. C. A. 2d, 1944) 141 F. (2d) 216; *Ralph Knight Inc. v. Mantel* (C. C. A. 8th, 1943) 135 F. (2d) 514; *Walling v. Peary-Wilson Lumber Co.* (D. C. W. D. La., Shreveport Div., 1943) 49 F. Supp. 846.

Commissioner of Internal Revenue. *Busey v. Deshler Hotel Co.* (C. C. A. 6th, 1942) 130 F. (2d) 187. See *Douglas v. Commissioner of Internal Revenue* (1944) 322 U. S. 275, 88 L. Ed. 1271, 64 S. Ct. 988.

Federal Security Administrator. *United States v. Lord-Mott Co.* (D. C. D. Md., 1944) 57 F. Supp. 128.

Interstate Commerce Commission. See *Illinois Steel Co. v. Baltimore & O. R. Co.* (1944) 320 U. S. 508, 88 L. Ed. 259, 64 S. Ct. 322.

Military Commanders. *Kiyoshi Hirabayashi v. U. S.* (1943) 320 U. S. 81, 87 L. Ed. 1774, 63 S. Ct. 1375.

State Agencies. *Johnston v. Board of Dental Examiners* (App. D. C., 1943) 134 F. (2d) 9, cert. den. 319 U. S. 758, 87 L. Ed. 1710, 63 S. Ct. 1177.

§ 501. Full Hearing and Findings Not Necessary.

Where the applicable statute requires a hearing before regulations are promulgated, such a hearing is a prerequisite to the validity of the regulations. *Federal Security Administrator v. Quaker Oats Co.* (1943) 318 U. S. 218, 87 L. Ed. 724, 63 S. Ct. 589.

Administrative Procedure Act. Statutory requirements for notice and hearing of proposed rule making are set forth in Section 4 of the Administrative Procedure Act, which provides as follows:

“RULE MAKING

“SEC. 4. Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts—

“(a) NOTICE.—General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

“(b) PROCEDURES.—After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 7 and 8 shall apply in place of the provisions of this subsection.

“(c) EFFECTIVE DATES.—The required publication or service of any substantive rule (other than one granting or recognizing exemption or relieving restriction or interpretative rules and statements of policy) shall be made not less than thirty days prior to the effective date thereof except as otherwise provided by the agency upon good cause found and published with the rule.

“(d) PETITIONS.—Every agency shall accord any interested person the right to petition for the issuance, amendment, or repeal of a rule.”

p. 498, n. 53. *Bowles v. Willingham* (1944) 321 U. S. 503, 88 L. Ed. 892, 64 S. Ct. 641; *Avant v. Bowles* (Em. App., 1943) 139 F. (2d) 702; *Pearson v.*

Walling (C. C. A. 8th, 1943) 138 F. (2d) 655, cert. den. 321 U. S. 775, 88 L. Ed. 1069, 64 S. Ct. 616. See also § 554.

p. 498, n. 54. Bowles v. Willingham (1944) 321 U. S. 503, 88 L. Ed. 892, 64 S. Ct. 641.

p. 498, n. 57. Rogge v. United States (C. C. A. 9th, 1942) 128 F. (2d) 800, cert. den. 317 U. S. 656, 87 L. Ed. 528, 63 S. Ct. 54.

§ 501A. (New) Publication in Federal Register Constitutes Constructive Notice of Contents of Regulation.

The publication of an administrative regulation in the Federal Register is constructive notice of its contents to all persons affected by it. *Yakus v. United States* (1944) 321 U. S. 414, 88 L. Ed. 834, 64 S. Ct. 660. Compare § 182D.

IV. EXTENT OF DUTY IMPOSED BY ADMINISTRATIVE REGULATION

§ 502. Scope of Statutory Duty Imposed Prior to Promulgation of Regulations.

p. 498, n. 58. *United States v. Monarch Distributing Co.* (C. C. A. 7th, 1940) 116 F. (2d) 11, cert. den. (1941) 312 U. S. 695, 85 L. Ed. 1130, 61 S. Ct. 732.

§ 502A. (New) Effect of Revocation of a Regulation.

Revocation of a regulation does not prevent indictment and conviction for violation of its provisions at a time when it remained in force. The reason for the common-law rule that the repeal of a statute ends the power to prosecute for prior violations is absent in the case of a prosecution for violation of a regulation issued pursuant to an existing statute, for revocation of the regulation does not repeal the statute, and though the regulation calls the statutory penalties into play, the statute, not the regulation, creates the offense and imposes punishment for its violation. *United States v. Hark* (1944) 320 U. S. 531, 88 L. Ed. 290, 64 S. Ct. 359.

Revocation of a regulation does not extinguish a liability for statutory damages which accrued while it was in effect. *Bowles v. Nichols* (C. C. A. 10th, 1945) 151 F. (2d) 155.

§ 503. Effect of Compliance with Regulation.

See also § 504A.

p. 499, n. 61. *Standard Oil Co. of California v. Johnson* (1942) 316 U. S. 481, 86 L. Ed. 1611, 62 S. Ct. 1168.

§ 504. Effect of Violation of Regulation or Rule.

Subject to the requirements of due process, the violation of a regulation may be constituted a criminal offense, the crime being violation of the statute by the willful disobedience of a regulation duly promulgated by the agency. * *Yakus v. United States* (1944) 321 U. S. 414, 88 L. Ed. 834, 64 S. Ct. 660; *United States v. Newman* (D. C. Ill., 1942) 44 F. Supp. 817. See also § 247A.

Where the regulation is promulgated by a public utility pursuant to the authorized order of an administrative agency, violation of

the regulation, lawfully made, is a violation of the statute. *Ambassador, Inc. v. United States* (1945) 325 U. S. 317, 89 L. Ed. 1637, 65 S. Ct. 1151.

Valid legislative regulations have the force of law. See § 492.

p. 499, n. 64. * *Yakus v. United States* (1944) 321 U. S. 414, 88 L. Ed. 834, 64 S. Ct. 660. See *L. P. Steuart Bro. v. Bowles* (1944) 322 U. S. 398, 88 L. Ed. 1350, 64 S. Ct. 1097.

Violation of an administrative rule promulgated under the authority of a statute may also be a violation of the statute. *Tiller v. Atlantic Coastline R. Co.* (1945) 323 U. S. 574, 89 L. Ed. 465, 65 S. Ct. 421.

§ 504A. (New) — Construction of Regulation Where Criminal Penalties Are Imposed.

Where criminal sanctions are imposed for the violation of administrative regulations, the regulations must be explicit and unambiguous, and will be construed strictly when violation is claimed. Interpretations of the regulation by the agency will be given little if any weight in construing the regulation. * *M. Kraus & Bros. v. United States* (1946) 327 U. S. 614, 90 L. Ed. 894, 66 S. Ct. 705; *Porter v. Nowak* (D. C. D. Mass., 1946) 65 F. Supp. 133; *United States v. Siegel Bros.* (D. C. E. D. Wash., 1943) 52 F. Supp. 238.

§ 504B. (New) — Waiver of Requirements of Regulation or Rule.

An administrative agency may insist upon compliance in detail with the valid administrative regulations promulgated by it. *Angelus Milling Co. v. Commissioner of Internal Revenue* (1945) 325 U. S. 293, 89 L. Ed. 1619, 65 S. Ct. 1162. However, while statutory requirements may not be waived, the agency may be held to have waived the requirements of its own regulations by dispensing with the formalities and investigating the merits. *Angelus Milling Co. v. Commissioner of Internal Revenue* (1945) 325 U. S. 293, 89 L. Ed. 1619, 65 S. Ct. 1162. Formal defects in a claim for refund of processing taxes were not cured by the fact that all data required by the regulations were furnished by the taxpayer's claim taken together with the claim of another taxpayer closely associated with the claimant in business, in whose name the claim was originally filed. *Angelus Milling Co. v. Commissioner of Internal Revenue* (1945) 325 U. S. 293, 89 L. Ed. 1619, 65 S. Ct. 1162.

